Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

LARRY D. BACH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does restitution ordered under the federal Mandatory Victims Restitution Act as part of a criminal sentence constitute punishment thereby rendering the retrospective application of that Act a violation of the Ex Post Facto Clause of the United States Constitution?

PARTIES TO THE PROCEEDING

The only parties to the proceedings before this Court are those set forth in the caption of the case.

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Petitioner, Larry D. Bach, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on April 16, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *United States v. Bach*, 172 F.3d 520 (7th Cir. 1999) and is reprinted in the Appendix A hereto at 1a. The Order entered by the District Court in *United States v. Bach*, No. 96-CR-30025 (C.D.IL., September 17, 1998), which Order resolved disputed sentencing factors including the issue of restitution, is not published and is reprinted in the Appendix B hereto at 8a. The Judgment of Conviction entered by the District Court in *United States v. Bach*, No. 96-CR-30025 (C.D.IL., September 17, 1998) is not published and is reprinted in the Appendix C hereto at 24a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit ("Court of Appeals") was entered on April 16, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article One, Section 9, Clause 3 of the United States Constitution provides:

> No Bill of Attainder or ex post facto Law shall be passed.

18 U.S.C. § 2248 (statutory note):

> **Effective date of amendments made by §§ 201-210 of Act April 26, 1996.** Act April 24, 1996, P.L. 104-132, Title II, Subtitle A, § 211, 110 Stat. 1241, provides: "The amendments made by this subtitle [for full classification, consult USCS Tables volumes] shall, to the extent constitutionally permissible, be effective for sentencing proceedings in cases in which the defendant is convicted on or after the date of enactment of this Act [Apr. 24, 1996].

18 U.S.C. § 3663A (The Mandatory Victims Restitution Act):

The text of this provision is reprinted in the Appendix E hereto at 44a.

18 U.S.C. § 3664(f)(1)(A):

> In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

U.S.S.G. § 5E1.1 (Nov. 1, 1997 ed):

> (a) In the case of an identifiable victim, the court shall —
>
> > (1) enter a restitution order for the full amount of the Victims loss, if such order is authorized under 18 U.S.C. . . . § 3663A; or
>
> * * *
>
> (g) Special Instruction
>
> > (1) this guideline applies only to a defendant convicted of an offense committed on or after November 1, 1997. Notwithstanding the provisions of § 1B1.11 (Use of guidelines Manual in Effect on Date of Sentencing), use the former § 5E1.1 (set forth in Appendix C, amendment 571) in lieu of this guideline in any other case.

STATEMENT OF THE CASE

The fundamental constitutional issue presented by this case is whether the Ex Post Facto Clause of the United States Constitution prohibits the retrospective imposition of restitution under the Mandatory Victim Restitution Act, 18 U.S.C. § 3663A, as part of a sentence imposed on a criminal defendant. This issue arises in the context of a federal criminal case in which the District Court sentenced Petitioner Larry D. Bach following his plea of guilty to

violating the mail fraud statute, 18 U.S.C. § 1341. The sentence required Petitioner to immediately pay mandatory restitution of $674,325.84 pursuant to the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A. That Act was effective April 24, 1996, over three years after the date of the offense for which Petitioner was indicted but prior to Petitioner's 1997 guilty plea and 1998 sentencing.

The Seventh Circuit Court of Appeals affirmed the sentence holding that the Act is not penal, and therefore not subject to the Constitution's Ex Post Facto Clause. The Seventh Circuit, acknowledged, however, that its construction of the Act was a minority view among the various circuit courts that have considered this issue.

A. The Indictment Underlying the Conviction and Sentence

On June 21, 1996, Petitioner Larry D. Bach was indicted in the United States District Court for the Central District of Illinois on two counts of mail fraud in violation of 18 U.S.C. § 1341. The Indictment alleged that "[b]eginning in July 1988, or before, and continuing through December, 1992" Petitioner devised a scheme to defraud and obtain money and property from investors in certain oil and gas lease programs in Louisiana which programs his company, Bach Energy Corporation, owned and operated. The Indictment alleged that the scheme to defraud was that Petitioner made certain "false and fraudulent oral and written representations and pretenses, and omissions of material facts, to induce investors to purchase interests in the oil and gas programs." The Indictment was based upon two mailings. Count 1 charged that a mailing occurred "[o]n or about June 25, 1991". Count 2 charged that a mailing occurred "[o]n or about July 1, 1991." No other mailings were alleged in the Indictment.

On November 3, 1997, after unsuccessfully attempting to have the District Court dismiss the Indictment as being barred by the statute of limitations for mail fraud[1], Petitioner pled guilty to Count 1 of the Indictment.

B. The Sentencing Proceedings Below

In September 1998, the District Court conducted a sentencing hearing. Prior to that sentencing hearing the probation office issued a presentence report which set forth the position that restitution should be ordered pursuant to the Victim and Witness Protection Act of 1982, 18 U.S.C. § 3663(a) ("VWPA"). Under that 1982 Act, restitution is not mandatory and the defendant's ability to pay is to be considered. Three days before the sentencing hearing, and in response to comments filed by the Government, the probation office issued a supplement to the presentence report stating that restitution in the amount of $676,088.22 was mandatory pursuant to the Mandatory Victims Restitution Act of 1996, 18 U.S.C.§ 3663A ("MVRA"), and that in accordance with Section 5E1.1 of the November 1, 1997 version of the United States Sentencing Guidelines, restitution "shall be ordered."

Following the sentencing hearing, the District Court issued its Order addressing the sentencing factors and overruling all of Petitioner's objections to the presentence report, as supplemented. With respect to the issue of restitution, the District Court, relying on *United States v. Newman*, 144 F.3d 531 (7th Cir. 1998), rejected Petitioner's

1. The Seventh Circuit Court of Appeals affirmed the District Court's denial of Petitioner's Motion to Dismiss the Indictment. This Petition does not raise any issue related to that aspect of that Opinion.

objection that applying the Mandatory Victims Restitution Act violated the constitutional prohibition against ex post facto laws. In *Newman*, the Seventh Circuit Court of Appeals held that the Mandatory Victims Restitution Act was not subject to the Constitution's Ex Post Facto Clause because the Act was not penal and thus could be applied retrospectively. The District Court stated that it agreed with the Government that the Mandatory Victim Restitution Act was applicable to Petitioner's case as he had pleaded guilty after that Act became effective. Although the District Court further found, over Petitioner's objection, that he had the ability to pay restitution, the District Court ruled that Petitioner's ability to pay restitution was irrelevant under the Mandatory Victim Restitution Act.

The District Court entered its Judgment of conviction against Petitioner, sentencing Petitioner pursuant to the Sentencing Reform Act of 1984 (98 Stat. 2032) to 30 months imprisonment and a three year supervised release term. A section of the District Court's Judgment decree entitled "CRIMINAL MONETARY PENALTIES" also imposed upon Petitioner as part of the sentence a requirement that Petitioner pay restitution of $674,325.84. The District Court directed that restitution to be paid in full immediately. The District Court's sentence did not impose any fine against Petitioner as the District Court determined that Petitioner did not have an ability to pay any fine, which under the applicable sentencing guidelines would have ranged up to $60,000.

Petitioner appealed to the Seventh Circuit Court of Appeals, which affirmed Petitioner's conviction and sentence. Petitioner asked the Court of Appeals to overrule its decision in *Newman* and declare restitution imposed

under the Mandatory Victims Restitution Act to be punitive in nature so as to subject the Act to the bar of retrospective application by the Ex Post Facto Clause. The Court of Appeals, however, found the Mandatory Victims Restitution Act to be functionally a tort statute which allows a tort victim to recover damages in a summary proceeding ancillary to a criminal prosecution. The Court of Appeals characterized the Act as simply a procedural innovation which should not trigger rights under the Ex Post Facto Clause. The Court of Appeals thus declined to overrule its *Newman* decision. Citing the decision of the Third Circuit Court of Appeals in *United States v. Edwards*, 162 F.3d 87, 89-90 (3rd Cir. 1998), the Seventh Circuit acknowledged however, that its view of the non-penal nature of the Mandatory Victims Restitution Act was a minority view[2].

REASONS FOR GRANTING THE WRIT

Introduction

This case involves a question which implicates a most important constitutional protection that a criminal defendant has to shield against the excesses which occur from time to time in the administration of justice, namely the prohibition on ex post facto laws. This constitutional prohibition against retrospective application of new laws gives expression to what this Court has termed a "presumption . . . deeply rooted in our jurisprudence, and [one that] embodies a legal doctrine centuries older than our Republic." *Lynce v. Mathis*, 519 U.S. 433, 439 (1997).

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2. The decision of the Seventh Circuit Court of Appeals did not discuss Petitioner's appeal of the District Court's determination that Petitioner had the ability to make restitution. Nor did the decision discuss Petitioner's argument on appeal that the District Court's order for immediate payment of the restitution was an abuse of discretion.

The result in this case — imposition of a mandatory restitution sum without regard to the ability of Petitioner Larry D. Bach to pay — was dictated solely by the fact that Petitioner was tried in the jurisdiction of the Seventh Circuit Court of Appeals. As stated by Judge Ripple in his dissent to the Seventh Circuit Court of Appeals *en banc* opinion in *Rutan v. Republican Party of Illinois*, 868 F.2d 943, 959 (7th Cir. 1989):

> American citizens . . . ought not have their legal protection depend on the accident of where Congress decided to draw the administrative line separating one circuit from another.

All of the Courts of Appeal have addressed this question, either in the context of the MVRA or the VWPA. Only the Seventh Circuit and the Tenth Circuit have found that restitution imposed as part of a criminal sentence is not punitive so as to trigger the constitutional protection of the Ex Post Facto Clause. All other Courts of Appeal have concluded that this constitutional protection bars retrospective application of changes in the criminal restitution laws when a criminal defendant is sentenced for offenses committed before the changes were enacted. The need for resolution of this conflict is self evident.

The question on which Petitioner seeks review also implicates the criminal-civil procedural distinctions that are embedded in our Constitution. This Court has dealt with a long line of cases in which it has addressed the issue of the application of criminal procedural protections to putatively civil procedures or actions. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 361-68 (1997) (civil commitment of violent predator); *United States v. Ursery*, 518 U.S. 267, 288-92

(1996) (forfeitures); *Austin v. United States*, 509 U.S. 602, 622 (1993) (forfeitures); *Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 784 (1994) (taxes); *United States v. Halper*, 490 U.S. 435, 452 (1988) (civil fines); *United Mine Workers v. Bagwell*, 512 U.S. 821, 834-38 (1994) (civil contempt sanctions); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-66 (1963) (citizenship revocation); *Vance v. Terrazas*, 444 U.S. 252, 266-67 (1980) (expatriation); and *Woodby v. INS*, 385 U.S. 276, 285 (1966) (deportation).

This issue, however, has not been addressed in the context of restitution imposed pursuant to statute as part of the imposition of a criminal sentence. In the present era which has given an increasingly prominent role to victims rights in criminal cases, the need for resolution of the nature of restitution in the context of criminal sentencing, particularly in view of the existing conflicts among the Courts of Appeal, is imperative at this time.

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THE DECISIONS OF A MAJORITY OF OTHER CIRCUIT COURTS OF APPEAL.

The decision of the Seventh Circuit Court of Appeals in the case below conflicts with the decisions of a majority of other Courts of Appeal that have addressed the issue of whether the Ex Post Facto Clause bars the retrospective application of changes to the federal restitution laws — the 1990 amendment to the Victim and Witness Protection Act, 18 U.S.C. §§ 3663(a)(2) and (3) (1994) ("VWPA") and the 1996 enactment of the Mandatory Victim Restitution Act,

18 U.S.C. § 3663A and the amendments to 18 U.S.C. § 3664 ("MVRA") — when sentencing defendants convicted of crimes occurring prior to the effective dates of those enactments. In the case of the MVRA, at issue in the decision below, the new law made restitution a mandatory part of a convicted defendant's sentence for certain enumerated offenses without consideration of a defendant's ability to pay. 18 U.S.C. § 3664(f)(1)(A). In the case of the VWPA, the amendment expanded the class of victims to whom a defendant could be ordered to make restitution. 18 U.S.C. § 3663(a)(2).

Enacted in 1996 the MVRA made mandatory the imposition of restitution to victims of certain enumerated crimes, including mail fraud as in Petitioner's case. 18 U.S.C. § 3663A(c)(1)(A)(ii); Pub. L. 104-132, Title II, §§ 201-211, Apr. 24, 1996, 110 Stat. 1227. Congress directed the courts to apply that Act "to the extent constitutionally permissible. . . for sentencing proceedings in cases in which the defendant is convicted on or after the date of enactment of [the] Act." 18 U.S.C. § 2248 (statutory note). The constitutional concern arises under the Ex Post Facto Clause prohibition which comes into play when a statute applies to criminal conduct occurring before its enactment and increases the punishment for that conduct or alters the rules regarding receipt of evidence. U.S. Const., Art. I, Sec. 9, cl. 3; *Dobbert v. Florida*, 432 U.S. 282, 292 (1977); *Calder v. Bull*, 3 Dall. 386, 390 (1798). *See Reason II, infra.*

One year prior to its decision in Petitioner's case, the Seventh Circuit Court of Appeals issued its decision in *United States v. Newman*, 144 F.3d 531 (7th Cir. 1998), holding that the MVRA was not penal and therefore not

subject to the Constitution's Ex Post Facto Clause prohibition against retrospective application. In Petitioner's case, the Court of Appeals refused to overrule its *Newman* opinion[3] and adopt the construction urged by Petitioner that restitution imposed under the MVRA as part of the imposition of a sentence on a criminal defendant is in fact punitive so as to bar the retrospective application of the Act. The Court of Appeals acknowledged, however, that its view of the Act as not being penal so as to implicate the Ex Post Facto Clause "is a minority view."[4]

Courts of Appeal for the Second, Third, Eighth, Ninth, Eleventh and District of Columbia circuits have held that mandatory restitution is sufficiently punitive so as to bar the retrospective application of the MVRA under the Ex Post Facto Clause in sentencing defendants for crimes committed prior to its enactment. *United States v. Thompson*, 113 F.3d 13, 14 n.1 (2d Cir. 1997); *United States v. Edwards*, 162 F.3d 87, 89-92 (3rd Cir. 1998); *United States v. Williams*, 128 F.3d 1239, 1241 (8th Cir. 1997); *United States v. Baggett*, 125 F.3d 1319, 1322 (9th Cir. 1997); *United States v. Siegel*, 153 F.3d 1256, 1259 (11th Cir. 1998); *United States v. Bapack*, 129 F.3d 1320, 1327 n.13 (D.C. Cir. 1998).

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3. The *Newman* decision noted that no judge of the Seventh Circuit requested to hear that case *en banc*. 144 F.3d at 533 nt.

4. Besides Petitioner's case and the *Newman* case, the Seventh Circuit has four other times held that the retrospective application of the MVRA does not violate the Ex Post Facto Clause. *United States v. Grimes*, 173 F.3d 634 (7th Cir. 1999); *United States v. Hoover*, 173 F.3d 564 (7th Cir. 1999); *United States v. Wells*, __ F.3d __, 1999 WL 236467 (7th Cir. 1999); *United States v. Szarwark*, 168 F.3d 993 (7th Cir. 1999).

In *Thompson*, the Second Circuit viewed the fact that the MVRA generally made significant changes to the VWPA as the reason to trigger the ex post facto bar. 113 F.3d at 15 n.1. In *Williams*, the Eighth Circuit viewed the express language of Section 3663A(a)(1) of the MVRA that restitution is to be ordered "in addition to . . . any other penalty authorized by law", as establishing that mandatory restitution was a penalty. 128 F.3d at 1241. In *Baggett*, the Ninth Circuit concluded that the elimination of consideration of a defendant's economic circumstances under the MVRA triggered the ex post facto bar. 125 F.3d at 1322. In *Siegel*, the Eleventh Circuit viewed the mandatory restitution as a penalty both from the express language of the MVRA and its prior precedents characterizing restitution under the VWPA as a criminal penalty. 153 F.3d at 1259-60. In *Bapack*, the District of Columbia Circuit, following *Thompson*, viewed the fact that restitution was now made mandatory as triggering the ex post facto bar. 129 F.3d at 1327 n.13. In *Edwards*, the Third Circuit viewed the mandatory restitution under MVRA as a form of punishment by reason of the MVRA statutory scheme and its legislative history, the circuit's prior precedents holding restitution under the VWPA as a criminal penalty and the circuit's prior precedents finding criminal restitution imposed as an integral part of the sentencing a form of criminal penalty. 162 F.3d at 91-92.

Only the Tenth Circuit has agreed with the view of the Seventh Circuit. *United States v. Nichols*, 169 F.3d 1255, 1279-80 (10th Cir. 1999).[5] The Tenth Circuit decision noted that its

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5. *Petition for Certiorari Filed* (June 30, 1999) (No. 99-5063). In *Nichols*, the District Court held that the Ex Post Facto Clause barred retrospective application of the MVRA and the Government did not take issue with the ruling. *Nichols*, 169 F.3d at 1279. The issue came before the Tenth Circuit only by reason of the brief of the amici. *Id.*

decision rejected the views of the other six circuits. *Id.* at 1280 n.9. The Tenth Circuit decision was based on two of its earlier decisions, *Id.* at 1280 n.8, one decided under a federal law involving the recovery of child support, *United States v. Hampshire*, 95 F.3d 999 (10th Cir. 1996) (18 U.S.C. § 288(c)), and one decided under the VWPA where the only issue was whether the ordered restitution exceeded the amount of the loss. *United States v. Arutunoff*, 1 F.3d 1112, 1121 (10th Cir. 1993).

The Courts of Appeal for the Fourth, Fifth and Sixth Circuits have not considered the MVRA, but have construed the VWPA as a penal statute that could not constitutionally be retrospectively applied. In *United States v. Bruchey*, 801 F.2d 456 (4th Cir. 1987), the Fourth Circuit reviewed a restitution order that compelled a defendant to sign a promissory note to the victim which required payments beyond the defendant's probation term. There was no ex post facto issue in that case. The Fourth Circuit decision noted that criminal restitution "rests with one foot in the world of criminal procedure and sentencing and the other in civil procedure and remedy, though because it is part of the sentencing process it is fundamentally 'penal' in nature", citing this Court's decision in *Kelly v. Robinson*, 479 U.S. 36, 51-52 (1986).

The Fifth Circuit in *United States v. Corn*, 836 F.2d 889, 895-96 (5th Cir. 1988) held that restitution ordered under the VWPA for events occurring before the effective date of that law was an ex post facto violation. Ten years later the Fifth Circuit decided *United States v. Rose*, 153 F.3d 208 (5th Cir. 1998), a case involving restitution ordered under the VWPA for a conviction under the Child Support Recovery Act, 18 U.S.C. § 288(c) ("CSRA"). The Fifth

Circuit held, as did the Tenth Circuit in *Hampshire, supra*, and the Seventh Circuit in *United States v. Black*, 125 F.3d 454 (7th Cir. 1997) — relied upon by the Seventh Circuit for its decision in *Newman* — that restitution under CSRA did not raise ex post facto concerns. But the Fifth Circuit noted that by reason of its decision in *Corn*, it differed from the Tenth and Seventh Circuit as to their characterizations of the VWPA as predominantly compensatory. *Rose*, 153 F.3d at 211 n.1.

The Sixth Circuit in *United States v. Jewett*, 978 F.2d 248, 252-53 (6th Cir. 1992), held that retrospective application of the 1990 amendment to the VWPA in sentencing a defendant convicted of mail fraud offenses committed prior to the amendment was prohibited as ex post facto. The Sixth Circuit noted that the legislative history of the amendment, although unnecessary to its determination, supported its conclusion. *Id.* at 253 n.5.

The First Circuit has not addressed the issue of the constitutionality of the retrospective application of the MVRA, but has recently noted in passing that such circumstances would contravene the Ex Post Facto Clause. *United States v. Licausi*, 167 F.3d 36, 52 n.4 (1st Cir. 1999). The First Circuit has, however, held that retrospective application of the VWPA would violate the Ex Post Facto Clause. *United States v. Gilberg*, 75 F.3d 15, 21 (1st Cir. 1996).

The Seventh Circuit decision in *Newman* — which decision is at the root of the decision below — relied on this Court's decision in *Hudson v. United States*, 522 U.S. 93 (1997) to determine whether restitution can be considered a civil or criminal punishment. *Newman,* 144 F.3d at 540.

The first consideration under *Hudson* is whether the legislature evidenced a preference for a criminal or civil penalty. *Id.* The Seventh Circuit was of the view that the express language of Section 3663A(a)(1), that restitution should be ordered in addition to "any other penalty authorized by law" was ambiguous. *Id.* This view of the MVRA conflicts with the decisions of the Third Circuit in *Edwards, supra,* the Eighth Circuit in *Thompson, supra,* and the Eleventh Circuit in *Siegel, supra,* all of which found that this plain language in the MVRA clearly evidenced a Congressional intent that mandatory restitution was intended to be a punitive measure.

Moreover, the Seventh Circuit in *Newman*, although purporting to apply the *Hudson* analysis, made no review of the legislative history of the MVRA. In contrast, the Third Circuit decision in *Edwards*, reciting in detail the legislative history of the MVRA[6], found that this history makes clear that Congress intended mandatory restitution "to be one means by which the criminal justice system that is more responsive to the needs of crime victims, as mandatory restitution, forces an individual defendant to address the harm his crime has caused to the individual victims of his crime and to society." 162 F.3d at 91. Similarly, the legislative history of the 1990 amendment to the Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 3663-3664, enacted by the Crime Control Act of 1990, Pub. L.

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6. S. Rep. 104-179, 1996 U.S.C.C.A.N. 924, 925-27, 929-34; H. Rep. 104-16, reported at 1995 WL 43586 (Feb. 2, 1995), at 5-6, 10, 12; 142 Cong. Rec. H3606 (daily ed., April 18, 1996); 141 Cong. Rec. S19278, S19280-81 (daily Ed., Dec. 22, 1995); and Mandatory Victim Restitution: Hearing on S. 173 Before the Comm. on the Judiciary of the United States Senate, 104th Cong. 805 (1995) (statements of Senators Biden, Grassley, and Nickles).

No. 101-647, § 2509, 104 Stat. 4789, 4863 (1990), which expanded the class of victims who could benefit from sentencing imposing restitution, reported the changes out as enhanced criminal penalties and provisions that enhanced existed criminal penalties. H. Rep. No. 681(1), 101st Cong., 2d Sess., 177, *reprinted in* 1990 U.S.C.C.A.N. 6472, 6583.

The Seventh Circuit's view of the nature of restitution imposed in connection with the sentencing of a criminal defendant conflicts sharply with all of the other Circuit Courts of Appeal, save one. The implications of the Seventh Circuit's view has a significant effect upon the fundamental constitutional protections afforded a criminal defendant by the Ex Post Facto Clause. Had Petitioner been prosecuted on the other side of the Mississippi River, or almost any place else in this country, he would not have suffered the imposition of mandatory restitution without due consideration of his ability to pay. The immense size of the immediate restitution payment that Petitioner has been ordered to bear evidences the very kind of oppressive consequences that the Ex Post Facto Clause was put in place to guard against. Petitioner urges this Court to grant the writ of certiorari in order to resolve this conflict between the Courts of Appeal.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW DISREGARDS THE PRINCIPLES PREVIOUSLY ESTABLISHED BY THIS COURT REGARDING THE PROHIBITIONS OF THE EX POST FACTO CLAUSE AND DISREGARDS THIS COURT'S EMPHASIS ON THE PRIMACY OF THE PENAL GOALS OF THE STATE IN THE IMPOSITION OF RESTITUTION.

A. Ex Post Facto Principles

The Ex Post Facto Clause forbids the retrospective application of criminal laws to a crime already committed that results in a disadvantage to an offender affected by that new law. U.S. Const., Art. I, § 9, cl. 3; *Lindsey v. Washington*, 301 U.S. 397, 401 (1937); *Miller v. Florida*, 482 U.S. 423, 430 (1987); *Weaver v. Graham*, 450 U.S. 24, 29-30 (1981). Petitioner meets the initial considerations for invoking an ex post facto challenge. First, he was sentenced to pay mandatory restitution under the MVRA, a law enacted years after he committed his offense. Second, he was disadvantaged by the application of the mandatory restitution law as his ability to pay restitution was deemed irrelevant[7]. The issue therefore is whether this disadvantage triggered the prohibition of the Ex Post Facto Clause.

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7. The finding of Petitioner's ability to pay restitution remains unreviewed. *See note* 2, *supra*. However, whether Petitioner would receive a different restitution sentence does not bar Petitioner from raising an ex post facto challenge to his mandatory restitution sentence. *Lindsey v. Washington*, 301 U.S. 397, 401-02 (1937).

The constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them. *Collins v. Youngblood*, 497 U.S. 37, 41 (1990). This Court has long held that a law that makes more burdensome the punishment for a crime after its commission, or that alters the rules regarding receipt of evidence, is prohibited as ex post facto. *Beazell v. Ohio*, 269 U.S. 167, 169-170 (1925); *Calder v. Bull*, 3 Dall. 386, 390 (1798) (opinion of Chase, J.). This Court has cautioned that where a law has been characterized as simply a procedural change, such a label does not immunize the law from scrutiny under the Ex Post Facto Clause, as a law that purports to effect a procedural change but which increases the punishment for a crime, operates to deny an accused a defense or which otherwise affects an accused in a harsh and arbitrary manner is likewise prohibited as ex post facto. *Collins*, 497 U.S. at 45-51; *Weaver*, 492 U.S. at 29, *Beazell*, 269 U.S. at 170.

The Seventh Circuit decision below trivialized the substantial personal right that Petitioner had prior to the enactment of the MVRA, namely the right to avoid a mandatory imposition of restitution and to have evidence of his ability to pay taken into consideration by a sentencing court in deciding to impose an order of restitution as part of a sentence. 18 U.S.C. §§ 3663(a)(1)(A) and (a)(1)(B)(ii). The substantial nature of this right is self evident in the present case. The District Court ordered Petitioner, then age 57, to immediately pay over $600,000 at the same time it sentenced Petitioner to 30 months imprisonment. Petitioner, his wife and his company had previously disgorged over $400,000 in a 1992 Securities and Exchange Commission action against him for securities fraud related to the same investment programs, which action was the genesis for the

present criminal prosecution. *See Securities and Exchange Commission v. Bach Energy Corporation, et al.*, No. 92-1271-S (U.S. Dist. Ct. W.D. La. Jan 14, 1994) (reprinted in the Appendix D hereto at 37a).

Seeking to avoid the ex post facto principles enunciated by this Court, the Seventh Circuit decision below characterized the mandatory restitution provision of the MVRA as simply a procedural innovation which does not trigger the ex post facto prohibition. The MVRA does not come within the "procedure" exception enunciated in *Dobbert v. Florida*, 432 U.S. 282, 293 (1977), which excepts from the ex post facto restrictions laws that simply control remedies and modes of procedure while not affecting matters of substance. The MVRA clearly affects matters of substance. The MVRA has the force and effect of law. Its provisions do not simply guide a court's discretion but mandate the imposition of restitution. Moreover, the application of the MVRA directly and adversely affects the sentence a convicted offender is to receive. The Court of Appeals decision in the case below has thus significantly mischaracterized the MVRA as simply a procedural innovation and in doing so has ignored the principles established by this Court for evaluating the application of the constitutional ex post facto prohibitions.

The Seventh Circuit decision below also ignores established principles enunciated by this Court by focusing on the motivation of the MVRA to streamline the cumbersome processes of the law to facilitate a tort victim's recovery of damages. Ever since this Court's decision in *Weaver v. Graham*, 450 U.S. 24, 33 (1981), the motivating interest for enacting a law is irrelevant to any essential inquiry as to whether the retrospective application of a law

is barred by the Ex Post Facto Clause. Rather, the inquiry is solely whether, based upon an objective appraisal, the new law is more onerous than the prior law. *Lynce v. Mathis*, 519 U.S. 433, 442-44 (1997).

The petition should be granted so that this Court can present clear guidance to the federal courts as to the proper application of this Court's longstanding ex post facto principles in the context of the imposition of criminal restitution in connection with the sentencing of a criminal defendant.

B. Fine-Restitution Distinction

The Seventh Circuit decision below reasoned that restitution imposed as part of a criminal sentence was not punitive because unlike the traditional criminal remedy of a fine, which is paid to the government, restitution is paid to the victim. This decision ignores this Court's decision in *Kelly v. Robinson*, 479 U.S. 36 (1986), in which this Court refused to find a distinction between the penal nature of criminal restitution and a criminal fine.

In *Kelly*, this Court held, in the context of a bankruptcy case, that restitution obligations imposed on a criminal defendant as a condition of the defendant's sentence of probation in state criminal proceedings were not subject to discharge in Chapter 7 bankruptcy proceedings. This Court ruled that such restitution was not dischargeable under 11 U.S.C. § 523(a)(7) which prohibits the dischargeability in bankruptcy of "a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." Although acknowledging, as did the Court of Appeals below, that

restitution, unlike traditional fines, is paid to the victim, this Court stated that the decision to impose restitution generally does not turn on the victim's injury but on the penal goals of the state and the defendant's situation. 479 U.S. at 51-52. This Court emphasized that it is the context in which the restitution is imposed that is controlling, not simply that the restitution is for the benefit of the victim. *Id.* This Court found further support for its conclusion by reason of the fact that in the context of the federal Victim and Witness Protection Act, restitution had been deemed penal and not compensatory by every federal court of appeals so as to preclude a criminal defendant from having a right to a jury trial under the Seventh Amendment. 479 U.S. at 53 n.14.

The Seventh Circuit decision below is in direct contradiction to this Court's reasoning in *Kelly.* The Court of Appeals decision rejects totally the concept that restitution is to be considered primarily as serving the state's penal goals, finding instead that the imposition of restitution was merely some form of ancillary process connected to the criminal prosecution. The Court of Appeals decision wrongfully elevates the benefit to the victim to whom the restitution is paid over the fact that the context in which the restitution is imposed is an integral part of a criminal sentence. Both in the decision below and in its prior *Newman* decision that it refused to revisit, the Seventh Circuit also ignores its own prior characterization that restitution was one of the earliest criminal remedies: "the original conception of [criminal restitution] is that of forcing the criminal to yield up to his victim the fruits of the crime. . . . This form of criminal restitution is sanctioned not only by history but also by its close relationship to the retributive and deterrent purposes of criminal punishment." *United States v. Fountain*, 768 F.2d 790, 800 (7th Cir. 1985).

The petition should be granted so that this Court can reaffirm the importance of its holding in *Kelly* that, notwithstanding the compensatory nature of criminal restitution and its benefit for crime victims, criminal restitution is imposed as an integral part of the punishment phase of a criminal proceeding so as to trigger the application of constitutional protections such as the bar against ex post facto laws.

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THE FEDERAL SENTENCING GUIDELINES INSTRUCTIONS ABOUT WHEN TO RETROSPECTIVELY APPLY THE MANDATORY RESTITUTION REQUIREMENTS.

The Seventh Circuit decision in the case below conflicts directly with the federal Sentencing Guidelines which reflect the considered judgment of the United States Sentencing Commission that retrospective application of the mandatory restitution provisions of the MVRA in sentencing a defendant for a crime committed prior to the effective date of the Guideline is barred by the Ex Post Facto Clause.

The Court of Appeals affirmed the District Court's September 1998 Judgment decree under which Petitioner was ordered as part of his sentence to pay restitution pursuant to U.S.S.G. § 5E1.1 (Nov. 1, 1997 ed.). That Guideline had been amended November 1, 1997 to incorporate the statutory changes brought about by Section 204(a) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 204(a), 110 Stat. 1227,

which added 18 U.S.C. § 3663A, the MVRA. United States Sentencing Commission, *Guideline Manual*, Highlights at p. XVII (Nov. 1998).

As indicated by this Court's decision in *Miller v. Florida*, 482 U.S. 423 (1987), the ex post facto prohibition applies to criminal sentencing guidelines. *Accord United States v. Seacott*, 13 F.3d 1380, 1384-86 (7th Cir. 1994) (applying *Miller* to the federal Sentencing Guidelines and noting that all sister circuits have held that retrospective application of a guideline amendment occurring after commission of a crime and which works to a defendant's detriment violates the Ex Post Facto Clause).

Recognizing that the MVRA presented clear concerns about it being retrospectively applied in violation of the Ex Post Facto Clause, the 1997 Guideline amendment added § 5E1.1(g), a special instruction that made the amended Guideline applicable only "to a defendant convicted of an offense committed on or after November 1, 1997." Petitioner was such a defendant. The special instruction of the amended Guideline provides that the former version of § 5E1.1 is to be used in any case where the offense for which a defendant has been convicted occurred prior to November 1, 1997. U.S.S.G. § 5E1.1(g). The former version of § 5E1.1 implemented the discretionary restitution provisions of the VWPA. U.S.S.G., Appendix C, amendment 571 (Nov. 1, 1997 version).

The Court of Appeals decision ignores the determination by the United States Sentencing Commission that the mandatory restitution provisions of the MVRA are not to be applied retrospectively to impose restitution when sentencing a defendant whose offense was committed prior

to the date of the § 5E1.1 Guideline amendments implementing the MVRA. The petition for certiorari should be granted to resolve this significant conflict regarding the constitutionality of the application of the restitution Sentencing Guideline.

CONCLUSION

For these reasons, a writ of certiorari should be issued to the United States Court of Appeals for the Seventh Circuit to review the question presented by this Petition.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED APRIL 16, 1999

In the
United States Court of Appeals
for the Seventh Circuit

No. 98-3403

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LARRY D. BACH,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois.
No. 96 CR 30025 — **Richard Mills**, *Judge.*

ARGUED JANUARY 22, 1999 — DECIDED APRIL 16, 1999

Before POSNER, *Chief Judge*, and FLAUM and RIPPLE, *Circuit Judges.*

POSNER, *Chief Judge.* The defendant pleaded guilty (with a reservation of one issue, whether the statute of limitations had run) to violating the federal mail fraud statute, 18 U.S.C. § 1341, by operating a Ponzi scheme. He

was sentenced to 30 months in prison and ordered to pay $674,325.84 in restitution to his victims.

Bach pretended to sell lucrative interests in oil and gas leases — in one case promising the investor a guaranteed monthly payment of $934 for every $25,000 invested. The scheme ended in December 1992, but Bach was not indicted until June 1996. The statute of limitations for mail fraud is five years. 18 U.S.C. § 3282. Only two mailings alleged to be in furtherance of the scheme to defraud, and therefore punishable under the mail fraud statute, were made within five years before the indictment was filed. Bach contends that they were not in furtherance of the scheme to defraud. One was a check for $934, purporting to represent a portion of revenues from one of the oil and gas leases, that he mailed to one of the victims of the scheme. Another was a report, purportedly of income and expenses relating to another lease, that Bach mailed to another victim, one who believed that he had bought an interest in that lease. Enclosed along with the report was a letter advising him that because of the financial results shown in the report, the amount of operating expenses deducted from his income had been increased.

Both mailings were made in 1991, by which time, as Bach points out, his victims were smelling a rat and beginning to seek legal counsel. With the scheme unraveling, he argues, the mailings could not have been in furtherance of it. But when asked at argument what the purpose of the mailings could have been, if not to lull the recipients into thinking that maybe they would get the promised returns from their investments after all, his lawyer

was at a loss. It is true that the mailings were not intended to elicit additional money from the recipients — but was that all there was to the scheme? The critical question is what the scheme was. *Schmuck v. United States*, 489 U.S. 705, 711-12 (1989); *United States v. Sampson*, 371 U.S. 75, 80-81 (1962). If it was merely to obtain money from gulled investors, then it ended when Bach received the money, and once a scheme to defraud is over and done with there is nothing more to further with additional mailings. *United States v. Maze*, 414 U.S. 395, 403-05 (1974). But if, as is altogether more plausible, the scheme was to obtain *and retain* the payments that the investors made, then mailings designed to make the investors think that the defendant was legit, and thus to reduce the likelihood that they would complain to the SEC or take other steps designed to recoup their losses, were indeed in furtherance of the scheme to defraud. "Avoidance of detection is often a material part of a fraudulent scheme; for an illegal scheme would hardly be undertaken were there to be no profit to the plotters." *United States v. LeDonne*, 21 F.3d 1418, 1430 (7th Cir. 1994); see also *United States v. Lane*, 474 U.S. 438, 451-53 (1986); *United States v. Mankarious*, 151 F.3d 694, 705 (7th Cir. 1998); *United States v. Brocksmith*, 991 F.2d 1363, 1367 (7th Cir. 1993); *United States v. Perry*, 152 F.3d 901, 904-05 (8th Cir. 1998). It is irrelevant that the mailings failed in their purpose; a scheme to defraud need not succeed to violate the mail fraud statute. *Schmuck v. United States*, *supra*, 489 U.S. at 715; *United States v. Koen*, 982 F.2d 1101, 1109 (7th Cir. 1992); *United States v. Frey*, 42 F.3d 795, 799 (3d Cir. 1994). It is all a question of what the scheme was.

Appendix A

It is true that language in some cases suggests a disposition to deem any and every effort to cover up a scheme to defraud as a part of the original scheme. See, e.g., *United States v. Brocksmith*, *supra*, 991 F.2d at 1367-68; *United States v. Georgalis*, 631 F.2d 1199, 1204-05 (5th Cir. 1980). But to take such language literally would generate tension with the principle generally followed in dealing with statute of limitations questions that fraud, and efforts to conceal the fraud, are separate frauds, since otherwise the statute of limitations in a fraud case would not run as long as the defendant was endeavoring to conceal the fraud — even if the plaintiff had already discovered it. E.g., *Wolin v. Smith Barney Inc.*, 83 F.3d 847, 851 (7th Cir. 1996); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-51 (7th Cir. 1990). It would be odd if, years after the government discovered and was investigating a mail fraud, a mailing designed to impede the investigation would not only be actionable as mail fraud and obstruction of justice in its own right, but also allow the government to prosecute the defendant for the original fraud no matter how long ago it had occurred. There is a clear analytic difference between a scheme to defraud investors and a scheme hatched and executed later to prevent the government from discovering and prosecuting the perpetrators after the original scheme ended, that is, after all the targets of the scheme were fleeced as planned. (Suppose that ten years after the fleecing, the defrauders, realizing that their victims had discovered the fraud and were complaining to prosecutors, fraudulently promised to return the money if the victims agreed not to cooperate with the government.) We need not decide whether, to the extent the second scheme succeeds in preventing the government from discovering the first within

the statutory period, the doctrine of fraudulent concealment, a defense to the statute of limitations in civil cases, would be applicable despite the fact that statutes of limitations tend to be more strictly construed in criminal than in civil cases. See, e.g., *Toussie v. United States*, 397 U.S. 112, 115 (1970); *United States v. Meador*, 138 F.3d 986, 994 (5th Cir. 1998). It is enough to note that in the present case the scheme was both to defraud and to retain investors' money and that the mailings charged in the indictment were indeed in furtherance of that scheme.

Let us move on to the sentence. Bach invites us to overrule *United States v. Newman*, 144 F.3d 531 (7th Cir. 1998), which holds that the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A, is not subject to the Constitution's ex post facto clause (and so it may be applied retroactively) because it is not penal. See also *United States v. Nichols*, No. 98-1231, 1999 WL 107021, at *24 (10th Cir. Feb. 26, 1999). We decline the invitation. Ours is a minority view, *United States v. Edwards*, 162 F.3d 87, 89-90 (3d Cir. 1998) (collecting cases), but we think it is correct. The Act requires the court to identify the defendant's victims and to order restitution to them in the amount of their loss. In other words, definite persons are to be compensated for definite losses just as if the persons were successful tort plaintiffs. See also 18 U.S.C. §§ 3664(h), (j). Crimes and torts frequently overlap. In particular, most crimes that cause definite losses to ascertainable victims are also torts: the crime of theft is the tort of conversion; the crime of assault is the tort of battery — and the crime of fraud is the tort of fraud. Functionally, the Mandatory Victims Restitution Act is a tort statute, though one that casts back to a much earlier

era of Anglo-American law, when criminal and tort proceedings were not clearly distinguished. See, e.g., *I. de S. & Wife v. W. de S.*, Y.B. Liber Assisarum, 22 Edw. 3, f. 99, pl. 60 (1348 or 1349); Carol S. Steiker, "Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide," 85 *Geo. L.J.* 775, 782-83 (1997); Gail Heriot, "An Essay on the Civil Criminal Distinction With Special Reference to Punitive Damages," 7 *J. Contemp. Leg. Issues* 43 (1996); David J. Seipp, "The Distinction Between Crime and Tort in the Early Common Law," 76 *B.U. L. Rev.* 59, 81 (1996). The Act enables the tort victim to recover his damages in a summary proceeding ancillary to a criminal prosecution. Cf. Richard S. Frase, "Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?," 78 *Calif. L. Rev.* 542, 669-70 (1990). We do not see why this procedural innovation, a welcome streamlining of the cumbersome processes of our law, should trigger rights under the ex post facto clause. It is a detail from a defrauder's standpoint whether he is ordered to make good his victims' losses in a tort suit or in the sentencing phase of a criminal prosecution. It would be different if the order of restitution required the defendant to pay the victims' losses not to the victims but to the government for its own use and benefit; then it would be a fine, cf. *In re Towers*, 162 F.3d 952, 955 (7th Cir. 1998); *United States v. Bongiorno*, 106 F.3d 1027, 1036 (1st Cir. 1997), which is, of course, traditionally a criminal remedy.

Bach also complains that the judge refused to allow him to present at the sentencing hearing certain exhibits which he had been led to understand would be allowed.

The judge did act abruptly, but we cannot find the harm to Bach. The exhibits were of computations of the amount of loss that Bach had inflicted on his victims. The computations were based on his argument that some of the losses were not attributable to him, such as losses resulting from solicitations to investors that were made by people working with him, notably an Indiana veterinarian who fell so completely for Bach's line that he gave up his practice, moved to New Orleans (the center of Bach's operations), and in all blessed innocence recruited additional investors for Bach's programs. Once Bach's argument for excluding the losses suffered by investors recruited by the vet, and for other exclusions, was properly rejected, his exhibits became irrelevant. And they *were* properly rejected. Relevant conduct within the meaning of the sentencing guidelines includes conduct by the defendant's agents, U.S.S.G. § 1B1-3(a)(1)(A); *United States v. Levinson*, 56 F.3d 780, 781-82 (7th Cir. 1995), and the vet was Bach's agent. The other relevant conduct to which Bach objects was also properly taken into account in the sentencing; it consisted of frauds that were mere variants of the offense of conviction and conducted at the same time.

No other issues need be discussed. The judgment is

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS, SPRINGFIELD DIVISION DATED AND FILED SEPTEMBER 17, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

No. 96-30025

UNITED STATES OF AMERICA,

Plaintiff,

v.

LARRY D. BACH,

Defendant.

ORDER

RICHARD MILLS, U.S. District Judge:

This cause is before the Court following Defendant's sentencing hearing.

On November 3, 1997, Defendant changed his plea from not guilty to guilty of mail fraud in violation of 18 U.S.C. § 1341. Defendant and the Government have raised the following unresolved objections to the Presentence Investigation Report ("PSR"):

Appendix B

OBJECTIONS AND FINDINGS

A. *GOVERNMENT*

The Government objects to paragraphs 17, 27, and 28 arguing that Defendant is not entitled to a three point reduction in his adjusted offense level for acceptance of responsibility. The Government asserts that Defendant has not truly accepted responsibility for his criminal conduct in that he has raised numerous frivolous and unsupported objections to the PSR in an attempt to minimize his sentence and the amount of restitution which he owes to his victims. In support of its objection, the Government has listed each objection raised by Defendant to the PSR and, then, has attempted to show the falsity and frivolity of the objection. Because Defendant has not shown that he truly and clearly has accepted responsibility for his criminal conduct, the Government argues that he is not entitled to a three point reduction for acceptance of responsibility.

However, Defendant reserved the right in his plea agreement to challenge, at sentencing, the Probation Office's calculation regarding the amount of loss. In addition, although Defendant acknowledged that restitution would be appropriate, he also reserved the right to challenge the specific amount of restitution owed. The Court believes that Defendant accepted responsibility for his criminal conduct when he entered a plea of guilty to Count I of the indictment. The Court cannot say that Defendant's objections are so patently frivolous that they are inconsistent with his acceptance of responsibility. U.S.S.G. § 3E1.1,

n. 1(a). Accordingly, the Government's objections to paragraphs 17, 27, and 28 are denied.

B. *DEFENDANT*

1. *Amount of Loss*

Defendant objects to paragraphs 10 through 13 which calculate the amount of loss in the instant offense. First, Defendant argues that several of the victims were not personally solicited by him, and therefore, he should not be held accountable for any loss sustained by those victims. Second, Defendant asserts that he should not be held accountable for any loss resulting from the BEC 89-3 (*i.e.*, the Grand Cane) program because that program is different from the other programs in that he did not guarantee any monthly payments to the BEC 89-3 investors. Third, Defendant argues that the PSR fails to set off from the amount of loss, funds which the investors received or should have received from other sources. Specifically, Defendant complains that the PSR fails to adequately determine and set off from the amount of loss: (1) the amount of revenues received by investors after BEC no longer operated the wells after the SEC's intervention, (2) the amount of revenue received by investors from Southern Oil & Gas which purchased several of the BEC 88-1 leases, and (3) the amount of revenue received by investors from the Michigan City, Indiana, investors who became operators of record of two of the BEC 88-1 leases in June 1991. Accordingly, Defendant argues that the amount of loss enhancement should be (at the most) "7" rather than "11."

Appendix B

A sentencing court has great latitude in determining the amount of loss from all of the information available. *United States v. Ross*, 77 F.3d 1525, 1552 (7th Cir. 1996); *United States v. Austin*, 54 F.3d 394, 402 (7th Cir. 1995). Moreover, application note 8 to U.S.S.G. § 2F1.1 provides that

> the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. This estimate, for example, may be based on the approximated number of victims and an estimate of the average loss to each victim, or on more general factors, such as the nature and duration of the fraud and the revenues generated by similar operations. The offender's gain from committing the fraud is an alternative estimate that ordinarily will underestimate the loss.

Id. Based upon the evidence presented to the Court at the sentencing hearing, in the parties' commentaries on sentencing factors, and to the United States Probation Office, the Court finds that the amount of loss as calculated by the United States Probation Office and the Government and as stated in the attached chart is accurate.[1]

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1. Subsequent to Defendant's sentencing hearing, a mathematical error was discovered. At the time of the sentencing hearing, the Court believed the amount of loss to be $852,293.29. However, the correct amount of loss is actually $824,814.15. Because this error does not affect Defendant's adjusted offense level, no further action is necessary.

First, simply because Defendant did not solicit a particular investor, that does not mean that that investor's loss should not be included as part of the amount of loss for sentencing purposes. Defendant has admitted that he was the organizer and/or leader of a scheme to defraud BEC investors. Moreover, Defendant was the ultimate beneficiary of the scheme to defraud, whether or not he was the one who solicited the investors.

For example, Defendant solicited Dr. Donald Pohlman to invest in BEC. Dr. Pohlman, in turn, solicited Ranier Martens to invest in BEC.[2] However, Defendant received the benefit of Martens' investment, not Pohlman. In fact, Defendant was the only person involved (other than perhaps his wife) who knew that the scheme was fraudulent. Otherwise, it is doubtful that anyone would have invested any money in BEC or would have solicited others to do so.[3]

Furthermore, the amount of loss should include the investments of those investors whom Defendant did not personally solicit because it constitutes relevant conduct. U.S.S.G. § 1B1.3(a)(1)(A) provides that "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the

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2. In Martens' case, Defendant spoke directly with Martens about his investment and BEC's guaranteed monthly payment program.

3. Dr. Pohlman cannot confirm whether he would have invested in and/or solicited others to join BEC because he is deceased.

defendant" constitute relevant conduct. It is clear that Defendant aided, abetted, and counseled others in their solicitation of potential investors in BEC. Because he was the sole beneficiary of the scheme to defraud, the losses sustained by investors which Defendant did not personally solicit are attributable to him for sentencing purposes. *United States v. O'Brien*, 119 F.3d 523, 533-35 (7th Cir. 1997).

Second, the Court finds that BEC 89-3 or the Grand Cane program is part of the same course of conduct or common scheme or plan as the convicted offense, and therefore, any loss attributable from the BEC 89-3 or Grand Cane program should be included as relevant conduct. The fact that Defendant may not have guaranteed the BEC 89-3 investors a monthly payment matters little. All of Defendant's activities involved investments in fraudulent oil and gas leases in oil and gas fields in Louisiana.

Furthermore, as with the investors in BEC 88-1 and 88-6, investors in the Grand Cane program were promised by Defendant investment recovery within a short period of time.[4] For example, Defendant induced Dr. Robert Russell of Springfield, Illinois, to invest $250,000.00 in the Grand Cane program promising him that the program was a "can't miss" type of investment and informing him that there were "no dry holes" on this lease.

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4. Defendant promised investors in BEC 88-1 and 88-6 guaranteed monthly payments; Defendant promised investors in BEC 89-3 investment recoupment within four months.

In addition, in the Grand Cane program, Defendant induced investors to invest in a gas field in which he had previously sold the rights to the gas to a private company, *i.e.*, Tifton Aluminum Company. Pursuant to the agreement between Defendant and Tifton Aluminum, the sale price was to be paid in two installments. However, at the same time in which Defendant solicited investors for the Grand Cane fields, he had pledged the fields as collateral on a personal loan with Ida Oil[5] and Dr. Hal Brown of the Cayman Islands. Defendant never informed investors about this arrangement.[6]

Application note 6 to U.S.S.G. § 2F1.1 provides that "[t]he cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction." *Id.*; *see United States v. Martinson*, 37 F.3d 353, 356 (7th Cir. 1994) (holding that the amount of loss related to a mail fraud count that was dropped by the Government on the eve of trial could be considered by the trial court in calculating the adjusted offense level under the Sentencing Guidelines). Albeit in a different context (*i.e.*, calculating drug amounts), the Seventh Circuit has opined that

> [t]wo or more offenses are part of a common scheme or plan if they are connected by at least

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5. Defendant's brother, Dan Bach, is the president of Ida Oil.

6. In addition, Tifton Aluminum obtained a default judgment against BEC in the amount of $3,000,000.00 when BEC failed to satisfy the terms of their contract.

> one common factor, such as "common victims, common accomplices, common purpose, or similar modus operandi." U.S.S.G. § 1B1.3(a)(2), Application Note 9. Offenses are part of the same course of conduct if they are "part of a single episode, spree, or ongoing series of offenses." *Id.* In assessing whether offenses are part of the same course of conduct, courts looked to "a strong relationship between the uncharged conduct and the convicted offense, focusing on whether the government has demonstrated a significant 'similarity, regularity, and temporal proximity.' " *Acosta*, 85 F.3d at 281 (citations omitted).

United States v. Bacallao, 149 F.3d 717, 1998 WL 416879, *2 (7th Cir. July 24, 1998). As described above, all of Defendant's schemes had common victims, a common purpose, a similar modus operandi, and were similar in regularity and temporal proximity. Defendant's individual fraudulent oil and gas schemes were so similar that the Court believes that each individual scheme (*i.e.*, BEC 88-1, 88-6, and 89-3) constitutes a larger overall fraudulent scheme. Thus, the Court finds that the losses sustained by the investors in BEC 89-3 should be included as part of the amount of loss for sentencing purposes.[7]

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7. Immediately prior to the sentencing hearing, Defendant filed an objection to including Ranier Martens' investment in calculating the amount of loss. Defendant argued that Martens invested in the BEC 88-5 program which was not part of the underlying charge or conviction; therefore, it should not be included

(Cont'd)

Third, the Court does not believe that the PSR is inaccurate for failing to set off from the amount of loss, funds which the investors received or should have received from other sources. Such a position would discourage victims from seeking self-help remedies in order to mitigate their losses. In addition, the amount of loss is determined at the point at which the fraud is discovered, not at the time of sentencing. *United States v. Holiusa*, 13 F.3d 1043, 1046-47 (7th Cir. 1994). Although the Seventh Circuit and the Sentencing Guidelines have adopted a "net loss approach" to calculating a criminal defendant's adjusted offense level, Defendant's PSR has employed such an approach. *Id.* As far as the Court is aware, Defendant has received credit for all of the funds and investments repaid to investors by Defendant, including the $452,318.42 in a bank account frozen by the SEC and distributed to investors.

Moreover, the Probation Office's and the Government's calculation of the amount of loss is based upon the SEC's reports and findings. The SEC based its reports and findings upon figures supplied by Defendant. Accordingly, Defendant cannot be heard to complain about the accuracy of those figures now.

The Probation Office and the Government relied upon the statements of the victims and on the SEC's reports in

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(Cont'd)
in the amount of loss calculation. However, the Court finds that Martens' investment should be included as part of the amount of loss for sentencing purposes because it constitutes relevant conduct for the same reasons that the Court found that the Grand Cane investments constitute relevant conduct.

calculating the amount of loss. U.S.S.G. § 2F1.1, n. 8. Those documents bear a sufficient indicia of reliability to support their accuracy. *United States v. Coonce*, 961 F.2d 1268, 1278-80 (7th Cir. 1992). In sum, the Court believes that the amount of loss calculation as stated in the attached chart is a reasonable estimate based upon the best available information and is supported by sufficient indicia of reliability. Accordingly, Defendant's objections to paragraphs 10 through 13 are denied.[8]

2. *Amount of Restitution*

Defendant objects to paragraphs 13, 15, and 68 which calculate the amount of restitution owed and to which victims it is owed. First, Defendant argues that restitution under the Victim and Witness Protection Act of 1982 can only be awarded for victim losses resulting from the specific conduct for which a criminal defendant is convicted. Thus, Defendant asserts that restitution should be much more limited in amount and in the alleged victims than established in the PSR. Second, Defendant asserts that he does not have the ability to pay the amount of restitution called for in the PSR. Accordingly, Defendant asks the Court to impose a lesser amount of restitution, if it determines to impose restitution at all.

First, Defendant is correct that the United States Supreme Court held in *Hughey v. United States*, 495 U.S.

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8. Notably, although Defendant objected to the charts and figures tendered to the Court by the Government and in the PSR, he never offered any alternative figures and/or charts in support of his objections.

411, 413 (1990), that the Victim and Witness Protection Act authorizes the sentencing court to impose restitution only for losses caused by the conduct underlying the offense of conviction. However, Defendant also acknowledges that the Seventh Circuit has held that *Hughey* "supports restitution for all victims of the scheme." *United States v. Bennett*, 943 F.2d 738, 740 (7th Cir. 1991). This Court is, of course, bound by the Seventh Circuit's interpretation, and thus, restitution is appropriate for all the victims of Defendant's fraudulent scheme.

Second, the Court rejects Defendant's argument regarding his ability to pay restitution for two reasons. First, contrary to his assertions, Defendant has the ability to make restitution. The Seventh Circuit has listed five factors which a sentencing court should consider in determining whether to order restitution:

> (1) the amount of loss sustained by the victims as a result of the offense; (2) the financial resources of the defendant; (3) the financial needs of the defendant and his or her dependents; (4) the financial earning ability of the defendant and his or her dependents; and (5) any other factors the court deems appropriate. *Loscalzo*, 18 F.3d at 386; 18 U.S.C. § 3664(a). However, although the sentencing court is required to consider the defendant's indigence, this one factor is not solely determinative of whether restitution is appropriate. *United States v. Boyle*, 10 F.3d 485, 492 (7th Cir. 1993).

Ross, 77 F.3d at 1552; 18 U.S.C. § 3664(a). The Court believes that these factors weigh in favor of ordering restitution. The victims lost large amounts of money as a result of Defendant's scheme, some of which had been saved for retirement funds. Defendant has the capacity, especially given his current and past entrepreneurial enterprises, to make restitution. Defendant has little debt and is currently engaged in an apparently lucrative business venture. Finally, Defendant has only one dependant, his wife, and her salary is greater than his. Thus, an order of restitution is appropriate.

Second, the Court agrees with the Government that the Mandatory Victim Restitution Act, 18 U.S.C. § 3663(A), is applicable in the case at bar because Defendant pleaded guilty after the Act became effective. *United States v. Newman*, 144 F.3d 531, 537-39 (7th Cir. 1998). Under the Mandatory Victim Restitution Act, restitution is mandatory. Therefore, Defendant's ability to pay restitution is irrelevant. Accordingly, Defendant's objections to paragraphs 13, 15, and 68 are denied.

Ergo, the Government's and Defendant's objections to the Presentence Investigation Report are DENIED. Therefore, Defendant has an adjusted offense level of 18 and a criminal history within category I, yielding a sentencing range of 27 to 33 months of imprisonment.

Accordingly, Defendant is sentenced to 30 months of imprisonment to be followed by a 3 year term of supervised release upon being discharged from the Bureau of Prisons. Defendant is ordered to pay a special assessment of $50.00

immediately. Defendant is also ordered to immediately pay restitution in the amount of $674,325.84 to the victims in the instant offense as reflected in the chart attached to this Order. No fine is ordered.

ENTER: 17 Sept., 1998

FOR THE COURT:

s/ Richard Mills
RICHARD MILLS
UNITED STATES DISTRICT JUDGE

Appendix B

LOSS					RESTITUTION			
INVESTOR	PRO-GRAM	AMOUNT INVESTED	AMOUNT PAID	AMOUNT OF LOSS	SCARBROUGH	QUEST ENERGY	SOUTHERN OIL & GAS	RESTITUTION
Burrows, Robert	88-1	37,500.00	25,628.43	11,871.57	1,266.49	10,144.90	0.00	460.18
Clancy, Tom	88-1	250,000.00	200,127.10	49.872.90	5,337.35	0.00	0.00	44,535.55
Connett, James	88-6	25,000.00	3,245.19	21,754.81	2,352.05	980.14	0.00	18,422.62
Courage, Richard	88-1	25,000.00	19,970.25	5,029.75	542.78			4,486.97
Dabagia, Milt	88-1	25,000.00	22,463.27	2,536.73	271.39	0.00	0.00	2,265.34
Fiss Partnership*	88-1	50,000.00	37,646.74	12,353.26	0.00	0.00	0.00	0.00
Foster, Frank	88-1	100,000.00	84,641.05	15,358.95	1,628.34			13,730.61
Frumento, Anthony	88-1	25,000.00	22,463.77	2,536.23	271.00			2,265.23
Hallman, Victor	88-6	25,000.00	3,245.19	21,754.81	2,352.05	658.44	0.00	18,744.32
Hankins, Chuck	88-6	25,000.00	4,179.19	20,820.81	2,216.36			18,604.45
Haverstock, Lynn*	88-6	25,000.00	3,245.19	21,754.81	13,754.81			8,000.00
Hepburn, Gary	88-1 88-6	25,000.00 25,000.00	22,577.25 21,482.00	2,422.75 3,518.00	257.82 375.42	346.26	0.00	4,961.25
Hultgren, Steve	88-1	25,000.00	22,463.77	2,536.23	271.00			2,265.23
Johnson, Bernice	88-1	100,000.00	81,193.49	18,806.51	1,990.20			16,816.31
Kauer, Clarence (Estate)	88-1	25,000.00	22,577.25	2,422.75	257.82			2,164.93
Keane, John (Estate)	88-1 88-6	100,000.00 200,000.00	91,568.16 250,884.66	8,431.84 0.00	904.63 117.60	11,310.86	0.00	0.00

Appendix B

LOSS					RESTITUTION			
INVESTOR	PRO-GRAM	AMOUNT INVESTED	AMOUNT PAID	AMOUNT OF LOSS	SCARBROUGH	QUEST ENERGY	SOUTHERN OIL & GAS	RESTITUTION
Krocek, Steve	88-6	25,000.00	3,254.46	21,745.54	2,306.82			19,438.72
Lernihan, Greg	88-6	12,500.00	6,380.51	6,119.49	655.86			5,463.63
Liddell, Charles	88-6	37,500.00	4,906.37	32,593.63	3,509.99			29,083.64
Martens, Ranier	88-1 88-6	25,000.00 25,000.00	21,094.85 2,459.87	3,905.15 22,540.13	416.13 2,424.42	0.00	0.00	23,604.73
McCarthy, John	88-1	25,000.00	22,463.77	2,536.23	271.00			2,265.23
Mesterpey, John	88-1	12,500.00	11,157.26	1,342.74	144.28			1,198.46
Meyers, Ed	88-1	25,000.00	22,192.40	2,807.60	298.53	0.00	0.00	2,509.07
Meyer, Doug	88-6	12,500.00	6,071.00	6,429.00	692.04	0.00	0.00	5,736.96
Miller, David	88-6	25,000.00	3,357.80	21,642.20	2,329.43			19,312.77
Miller, Herbert	88-6	25,000.00	3,245.19	21,754.81	2,352.05	612.64	6,691.32	12,098.80
Morris, Tom	88-1	25,000.00	19,528.00	5,472.00	588.01			4,883.99
Morrison, Jack**	89-3	50,000.00	50,000.00	0.00	0.00	0.00	0.00	0.00
Perkins, Richard	88-1	200,000.00	164,164.69	35,835.31	3,858.27	0.00	0.00	31,977.04
Pizarek, Tom	88-1 88-6	150,000.00 37,500.00	135,451.40 4,826.95	14,548.60 32,673.05	1,565.02 3,514.51			42,142.12
Pohlman, Don (Estate)	88-1(2) 88-6 89-3	625,000.00 85,000.00 50,000.00	506,627.04 8,676.88 12,944.54	40,009.96 76,323.12 37,055.46	4,306.07 8,218.62 3,989.44	2,477.00	3,044.00	131,353.41
Polk, Dennis	88-1 88-6	25,000.00 50,000.00	22,313.97 6,620.98	2,686.03 43,379.02	284.96 4,667.92			41,112.17

Appendix B

LOSS					RESTITUTION			
INVESTOR	PRO-GRAM	AMOUNT INVESTED	AMOUNT PAID	AMOUNT OF LOSS	SCARBROUGH	QUEST ENERGY	SOUTHERN OIL & GAS	RESTITUTION
Radke, Lester	88-6	12,500.00	1,622.56	10,877.44	1,166.98			9,710.46
Rodkin, Don	88-6	25,000.00	3,245.19	21,754.81	2,352.05	4,548.29		14,854.47
Russell, Robert**	88-1 88-6 89-3	27,808.00 10,226.48 34,161.30	27,808.00 10,226.48 34,161.30	0.00 0.00 0.00	0.00			0.00
Schiller, John	88-1	25,000.00	22,463.77	2,536.23	271.00			2,265.23
Schneider, Rob	88-1	25,000.00	22,463.77	2,536.23	271.00	0.00	0.00	2,265.23
Shamblin, William	88-1	12,500.00	11,232.24	1,267.76	135.69			1,132.07
Shepperd, Gerald	88-1 88-6	50,000.00 50,000.00	46,242.17 6,992.00	3,757.83 43,008.00	402.56 4,631.74	165.00	0.00	41,566.53
Smith, Michael*	88-1	25,000.00	22,463.77	2,536.23	0.00	0.00	0.00	0.00
Snyder, Steven	88-6	25,000.00	4,179.19	20,820.81	2,216.36	0.00	0.00	18,604.45
Spiller, Tom	88-1 88-6	25,000.00 25,000.00	18,118.77 4,082.59	6,881.23 20,917.41	737.27 2,252.54			24,808.83
Weiss, Al	88-6	25,000.00	3,238.05	21,761.95	2,343.00	0.00	0.00	19,418.95
Woodfield, Ted	88-6	12,599.00	1,622.56	10,976.44	1,180.55			9,795.89
TOTAL		**$3,069,794.78**	**$2,217,501.49**	**$824,814.15**	**$98,521.22**	**$31,243.53**	**$9,735.32**	**$674,325.84**

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS DATED AND FILED SEPTEMBER 17, 1998

United States District Court
Central District of Illinois

Case Number: 3:96CR30025-001

UNITED STATES OF AMERICA

v.

LARRY D. BACH

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Howard W. Feldman
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1

* * *

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 1341	Mail Fraud	6/25/1991	1

Appendix C

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

☒ Count(s) 2 is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 531-42-0066

09/14/1998
Date of Imposition of Judgment

Defendant's Date of Birth: 10/01/1940

Defendant's USM No.: 10880-026

s/ Richard Mills
Signature of Judicial Officer

Defendant's Residence Address:
19 Meadow Run
Round Rock TX 78664

RICHARD MILLS
U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

Defendant's Mailing Address:
19 Meadow Run
Round Rock TX 78664

09/17/1998
Date

Appendix C

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 30 month(s).

☒ The court makes the following recommendations to the Bureau of Prisons:

That the defendant be placed in a facility as close to his home in Texas as possible.

* * *

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☒ before 2 p.m. on 10/14/1998.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 year(s).

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

Appendix C

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☒ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision — Sheet 3.01

Appendix C

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Appendix C

Judgment-Sheet 3.01

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall not own, purchase, or possess a firearm, ammunition, or other dangerous weapon.

2. The defendant shall not incur any new debts or open any additional lines of credit in excess of $200 without prior approval of the probation officer.

3. The defendant shall provide the probation officer access to any requested financial information including both his business and personal income tax returns.

Appendix C

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 50.00	$	$ 674,325.84

* * *

RESTITUTION

* * *

☒ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Appendix C

Name of Payee	**Total Amount of Loss	Amount of Restitution Offered
Robert Burrows	$11,871.57	$460.18
Tom Clancy	$49,872.90	$44,535.55
James Connett	$21,754.81	$18,422.62
Richard Courage	$5,029.75	$4,486.97
Milt Dabagia	$2,536.73	$2,265.34
Frank Foster	$15,358.95	$13,730.61
Anthony Frumento	$2,536.23	$2,265.23
Victor Hallman	$21,754.81	$18,744.32
Chuck Hankins	$20,820.81	$18,604.45
Lynn Haverstock	$21,754.81	$8,000.00
Gary Hepburn	$5,940.75	$4,961.25
Steve Hultgren	$2,536.23	$2,265.23
Bernice Johnson	$18,806.51	$16,816.31

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994.

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Clarence Kauer, Estate	$2,422.75	$2,164.93
Steve Krocek	$21,745.54	$19,438.72
Greg Lernihan	$6,119.49	$5,463.63
Charles Liddell	$32,593.63	$29,083.64
Ranier Martens	$26,445.28	$23,604.73
John McCarthy	$2,536.23	$2,265.23
John Mesterpey	$1,342.74	$1,198.46
Ed Meyers	$2,807.60	$2,509.07
Doug Meyer	$6,429.00	$5,736.96
David Miller	$21,642.20	$19,312.77
Herbert Miller	$21,754.81	$12,098.80
Tom Morris	$5,472.00	$4,883.99
Richard Perkins	$35,835.31	$31,977.04
Tom Pizarek	$47,221.65	$42,142.12
Don Pohlman, Estate	$153,388.54	$131,353.41

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Dennis Polk	$46,065.05	$41,112.17
Lester Radke	$10,877.44	$9,710.46
Don Rodkin	$21,754.81	$14,854.47
John Schiller	$2,536.23	$2,265.23
Rob Schneider	$2,536.23	$2,265.23
William Shamblin	$1,267.76	$1,132.07
Gerald Shepperd	$46,765.83	$41.566.53
Steven Snyder	$20,820.81	$18,604.45
Tom Spiller	$27,798.64	$24,808.83
Al Weiss	$21,761.95	$19,418.95
Ted Woodfield	$10,976.44	$9,795.89
John Keane, Estate	$8,431.84	
Fiss Partnership	$12,353.26	
Michael Smith	$2,536.23	
Totals:	$824.814.15	$674.325.84

Appendix C

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ in full immediately;

* * *

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. If all criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

* * *

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

See attached order.

Appendix C

Guideline Range Determined by the Court:

Total Offense Level: 18

Criminal History Category: I

Imprisonment Range: 27 to 33 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 6,000.00 to $ 60,000.00

☒ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ 674,325.84

* * *

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

* * * *

APPENDIX D — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, SHREVEPORT DIVISION IN *SECURITIES AND EXCHANGE COMMISSION v. BACH ENERGY CORPORATION, et al.*, CIVIL ACTION NO. 92-1271-S DATED AND FILED JANUARY 14, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CIVIL ACTION NO.
92-1271-S

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BACH ENERGY CORPORATION, BI-PETRO RESOURCES, INC., LARRY D. BACH, SR., and SANDRA J. BACH,

Defendants,

TOTAL ENERGY CORPORATION,

Defendant for
Purposes of Relief.

FINAL JUDGMENT AS TO LARRY D. BACH, SR., SANDRA J. BACH AND TOTAL ENERGY, INC.

Appendix D

Plaintiff, Securities and Exchange Commission ("Commission"), having filed its Complaint for Permanent Injunction and Other Equitable Relief in this matter; defendants Larry D. Bach, Sr. and Sandra J. Bach (collectively "the Bachs") and relief defendant Total Energy Corporation ("Total") having previously consented to the entry of Orders of Permanent Injunction and other Equitable Relief entered by this Court on July 9, 1992, in which: (a) the Bachs were permanently enjoined from further violations of Sections 5(a), 5(c) and 17(a) of the Securities Act and Sections 10(b) and 15(a) of the Exchange Act; (b) the Bachs and Total were each ordered to pay disgorgement of an amount to be determined by agreement of the parties, plus prejudgment thereon; and (c) the Bachs were ordered to pay civil penalties of amounts to be agreed upon by the parties; the parties having agreed to an entry without further notice of this Final Judgment, and it further appearing that no further notice of hearing for the entry of this Final Judgment need be given; and the Court being fully advised in the premises:

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED THAT:

I.

Defendants Larry D. Bach, Sr., Sandra J. Bach and relief defendant Total shall jointly and severally disgorge to the Registry of this Court the sum of $600,000, provided that payment of the difference between the $600,000 and the amount currently on deposit for the Bachs and Total's benefit with the Court-appointed escrow agent in this matter,

and all prejudgment interest, is waived based upon (1) the Bachs and Total's inability to pay as established through their sworn testimony, their sworn financial statements and other evidence adduced by them in this matter; (2) and upon the condition that they shall have provided complete and truthful information in said testimony and financial statements concerning the funds each received in connection with the activities alleged in the Complaint in this action, and concerning their financial condition, including their assets, liabilities, income and expenses; and (3) the agreement of the Bachs to secure a loan, pledging their homestead in Shreveport, Louisiana as collateral, and to pay a portion of said loan proceeds, estimated by the parties at this time to be approximately $185,000, to Tifton Aluminum Company in exchange for a mutually acceptable release. The Bachs and Total waive any and all claims to the amount currently on deposit in the escrow account and agree to allow the escrow-agent to immediately transfer all sums in the escrow account to the Registry of this Court upon entry of this Final Judgment. Plaintiff, Commission, at any time following the entry of this Final Judgment may petition the Court for a hearing to reconsider the Bachs and Total's inability to pay disgorgement and interest if the Commission obtains information from any source that their sworn testimony, sworn financial statements or any other evidence adduced by the Bachs and Total regarding the funds and assets each received in connection with the activities alleged in the Complaint, or their financial condition, including their assets, liabilities, income or expenses, were inaccurate or incomplete in any material respect. In connection with any such petition, the Court may consider all available remedies, including, but not limited

to, determining the appropriate amount of disgorgement and interest, ordering the defendants to pay additional funds or assets, directing the forfeiture of any concealed assets or sanctions for contempt of this Court's Final Judgment. The Bachs and Total may not by way of defense contest the allegations in the Complaint or assert that disgorgement and prejudgment interest are inappropriate for the violations alleged in the Complaint.

II.

Based upon the Bachs' representations to the Commission under oath, that they are financially unable to pay civil penalties, the Court is not ordering any of them to pay penalties. The Court does, however, note the appropriateness of civil penalties in this instance. The determination that the Bachs are unable to pay civil penalties is conditioned on the truthfulness of the representations in the Bachs' sworn financial statements and sworn deposition given in this action. The Commission may, at any time following the entry of this Final Judgment, petition the Court for a hearing to reconsider the Bachs' financial inability to pay civil penalties if the Commission obtains information from any source that the Bachs' sworn financial statements, sworn depositions, or any other evidence adduced by them regarding their financial condition, including their assets, liabilities, income or expenses, were inaccurate or incomplete in any material respect. In connection with any such petition, the Court may consider all available remedies, including, but not limited to, ordering the Bachs to pay civil penalties for the violations alleged in the Complaint and ordering further discovery. The Bachs may not by way of

defense to that petition, contest the allegations in the Complaint or assert that penalties are inappropriate for the violations alleged in the Complaint.

III.

IT IS FURTHER ORDERED that the Court-appointed escrow agent shall immediately transfer to the Registry of this Court all funds currently on deposit in the escrow account for the Bachs and Total's benefit, pending a final plan of distribution to be submitted by the Commission to the Court.

IV.

IT IS FURTHER ORDERED that the Bachs shall continue to be permanently enjoined from further violations of the provisions of the federal securities laws as set forth in this Court's Orders of Permanent Injunction and Other Equitable Relief entered against each of them on July 9, 1992, and that this Court shall retain jurisdiction of this action for all purposes, including for purposes of entertaining any suitable application or motion by the Commission for additional relief within the jurisdiction of this Court, including but not limited to the relief requested by the Commission in its Complaint in this action.

V.

IT IS FURTHER ORDERED that Paragraphs I, VII, VIII, and IX of the Agreed Order Freezing Assets and Other

Appendix D

Equitable Relief, entered by this Court on July 9, 1992, are hereby dissolved.

Dated and signed this 14 day of January, 1994.

s/ Donald E. Walsh
UNITED STATES DISTRICT JUDGE

AGREED AS TO SUBSTANCE AND FORM:

s/ Larry D. Bach, Sr.
LARRY D. BACH, SR.

s/ Sandra J. Bach
SANDRA J. BACH

s/ Larry D. Bach, Sr.
TOTAL ENERGY, INC.
By Larry D. Bach, Sr., President

On this 7th day of January, 1994, before me personally appeared Larry D. Bach, Sr., known to me to be the person who executed the foregoing Final Judgment in his capacity as president of Total Energy, Inc., and he acknowledged to me that he executed the same.

s/ Bonnie R. Guin
Notary Public, in and for
DeSoto Parish
Louisiana

My commission expires:
at death

Appendix D

CORPORATE RESOLUTION

I, Larry D. Bach, Sr., president of Total Energy, Inc., a corporation duly organized and existing under the laws of the State of Louisiana, United States, do hereby certify that the following is a true and correct copy of a certain resolution duly adopted by the Board of Directors of that corporation:

BE IT RESOLVED that Larry D. Bach, Sr., Director and President of Total Energy, Inc., be and hereby is authorized and directed on behalf of Total Energy, Inc., in connection with a civil injunctive action filed by the Securities and Exchange Commission, plaintiff, against Total Energy, Inc., defendant for purposes of relief, in the United States District Court for the Western District of Louisiana, Shreveport Division, to execute and agree to entry of, on behalf of Total Energy, Inc., the forgoing Final Judgment.

IN WITNESS WHEREOF, I have hereunto set my hand affixed the seal of the Corporation on this 7th day of January, 1993.

TOTAL ENERGY, INC.

By: s/ Larry D. Bach
LARRY D. BACH, SR.
President

Corporate Seal

s/ Dan R. Waller
Dan R. Waller, Esq.
Attorney for the Bachs and Total

APPENDIX E — RELEVANT STATUTE

18 U.S.C. § 3663A

§ 3663A. Mandatory restitution to victim of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant —

(1) The case of an offense resulting in damage to or loss or destruction of property of a victim of the offense —

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to —

(i) the greater of —

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim —

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

Appendix E

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense —

(A) that is —

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, including any offense committed by fraud or deceit; or

(iii) an offense described in section 1365 (relating to tampering with consumer products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that —

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

* * * *

Supreme Court, U.S.
FILED
SEP 17 1999
OFFICE OF THE CLERK

No. 99-127

In the Supreme Court of the United States

LARRY D. BACH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

RICHARD A. FRIEDMAN
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QUESTION PRESENTED

Whether the *Ex Post Facto* Clause, U.S. Const. Article I, Section 9, Clause 3, bars the application of the provisions of the Mandatory Victims Restitution Act of 1996, 18 U.S.C. 3663A and 3664 (Supp. III 1997), to offenses committed before the effective date of the Act.

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In the Supreme Court of the United States

No. 99-127

LARRY D. BACH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 172 F.3d 520. The order of the district court (Pet. App. 8a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1999. The petition for a writ of certiorari was filed on July 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea, petitioner was convicted in the United States District Court for the Central District of Illinois of one count of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to 30 months' imprisonment and ordered to pay restitution to his victims

in the amount of $674,325.84. The court of appeals affirmed. Pet. App. 1a-7a.

1. From July 1988 to December 1992, petitioner operated a Ponzi scheme in which he solicited investors to purchase oil and gas interests through his company, Bach Energy Corporation (BEC), in exchange for a guaranteed monthly payment for their investment. Contrary to petitioner's representations to investors, the various ventures were not producing the returns promised, but rather the investments made by new investors were used to pay the guaranteed returns for previous investors. Meanwhile, petitioner was drawing funds from BEC to pay his large salary and as loans. By the end of 1989, petitioner owed BEC nearly $1 million. Pet. App. 2a; Gov't C.A. Br. 5-8.

On November 3, 1997, petitioner entered into a plea agreement in which he pleaded guilty to one count of mail fraud, in violation of 18 U.S.C. 1341. In paragraph 10 of the plea agreement, petitioner stipulated that "restitution is appropriate in this case." App., *infra*, 5a. Petitioner further agreed "to make restitution * * * imposed by the Court in the time and manner to be determined by the United States Probation Office and the United States Attorney's Office for the Central District of Illinois." *Ibid.*

2. The district court adopted the recommendation of the Presentence Report (PSR) that petitioner make restitution and ordered petitioner to make restitution in the amount of $674,325.84. Pet. App. 8a-23a. The court rejected petitioner's contention that he lacked the ability to pay restitution "for two reasons." *Id.* at 18a. First, the court concluded, "contrary to [petitioner's] assertions, [he] has the ability to make restitution." *Ibid.* The court explained that petitioner "has the capacity, especially given his current and past entre-

preneurial enterprises, to make restitution. [Petitioner] has little debt and is currently engaged in an apparently lucrative business venture. Finally, [petitioner] has only one dependent, his wife, and her salary is greater than his." *Id.* at 19a. "Thus," the court found, "restitution is appropriate." *Ibid.*

"Second," the court ruled, petitioner's "ability to pay restitution is irrelevant" under the Mandatory Victims Restitution Act of 1996 (MVRA), 18 U.S.C. 3663A and 3664 (Supp. III 1997). Pet. App. 19a. The MVRA provides that, when sentencing a defendant convicted of certain offenses, including fraud, 18 U.S.C. 3663A(c)(1)(A)(ii) (Supp. III 1997), "the court shall order, in addition to * * * any other penalty authorized by law, that the defendant make restitution to the victim of the offense." 18 U.S.C. 3663A(a)(1) (Supp. III 1997). The MVRA further provides that "the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant." 18 U.S.C. 3664(f)(1)(A) (Supp. III 1997). Congress directed that the MVRA "shall, to the extent constitutionally permissible, be effective for sentencing proceedings in cases in which the defendant is convicted on or after the date of enactment of this Act [April 24, 1996]." 18 U.S.C. 2248 (Supp. III 1997) (statutory notes).

Petitioner had argued that "restitution is appropriate in accordance" with the Victim and Witness Protection Act of 1982 (VWPA), which the MVRA amended in 1996. See Pet. C.A. Supp. App. 34 (June 5, 1998 letter attaching Defendant's Additional Objections To PSR). Under the VWPA, an award of restitution was discretionary, 18 U.S.C. 3663(a) (1988), and "in determining whether to order restitution * * * and the amount of

such restitution," the court considered "the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate." 18 U.S.C. 3664(a) (1988).

In rejecting petitioner's contentions, the district court found that the MVRA "is applicable in the case at bar because [petitioner] pleaded guilty after the Act became effective." Pet. App. 19a. As support for that conclusion, the court cited the Seventh Circuit's decision in *United States* v. *Newman*, 144 F.3d 531, 537-542 (1998), which held that an award of restitution under the MVRA is not criminal punishment, and therefore the *Ex Post Facto* Clause does not bar the Act's application to an offense committed before its enactment.

3. The court of appeals affirmed. Pet. App. 1a-7a. The court declined to overrule its decision in *Newman*. *Id.* at 5a. The court explained that, under the MVRA, "definite persons are to be compensated for definite losses just as if the persons were successful tort plaintiffs," and "[f]unctionally, the [MVRA] is a tort statute, though one that casts back to a much earlier era of Anglo-American law, when criminal and tort proceedings were not clearly distinguished." *Id.* at 5a-6a. The court further reasoned that "[i]t is a detail from a defrauder's standpoint whether he is ordered to make good his victims' losses in a tort suit or in the sentencing phase of a criminal prosecution." *Id.* at 6a. The court recognized that "[i]t would be different if the order of restitution required the defendant to pay the victims' losses not to the victims but to the government for its own use and benefit; then it would be a fine,

which is, of course, traditionally a criminal remedy." *Ibid.* (citations omitted).[1]

ARGUMENT

1. Petitioner argues (Pet. 17-22) that, because the MVRA is a penal statute, the *Ex Post Facto* Clause bars the retroactive imposition of a mandatory restitution order without regard to a defendant's ability to pay.[2] As petitioner explains (Pet. 9-16), the courts of appeals are divided on that question. The majority view is that restitution under the MVRA is criminal punishment subject to the *Ex Post Facto* Clause. See *United States* v. *Edwards*, 162 F.3d 87, 89-92 (3d Cir. 1998); *United States* v. *Siegel*, 153 F.3d 1256, 1258-1260 (11th Cir. 1998); *United States* v. *Bapack*, 129 F.3d 1320, 1327 n.13 (D.C. Cir. 1997); *United States* v. *Williams*, 128 F.3d 1239, 1241 (8th Cir. 1997); *United States* v. *Baggett*, 125 F.3d 1319, 1322 (9th Cir. 1997); *United States* v. *Thompson*, 113 F.3d 13, 15 n.1 (2d Cir.

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[1] The court of appeals also held that petitioner's mailings were in furtherance of the scheme to defraud, Pet. App. 2a-5a, and that the district court did not err in refusing to allow petitioner to present certain exhibits at the sentencing hearing, *id.* at 6a-7a. Petitioner does not challenge those rulings in this Court.

[2] Petitioner also argues (Pet. 22-24) that a mandatory imposition of restitution for criminal offenses committed before April 24, 1996 conflicts with USSG § 5E1.1(g). That provision states that the mandatory restitution provision of USSG § 5E1.1(a)(1) applies only to those offenses committed on or after November 1, 1997. We note, however, that Application Note 1 to USSG § 5E1.1 states that, "[t]o the extent [18 U.S.C. 3663A] conflicts with the provisions of this guideline, the applicable statutory provision shall control," and Congress intended Section 3663A to be effective, to the extent constitutionally permissible, in all sentencing proceedings in which the defendant is convicted after April 24, 1996. 18 U.S.C. 2248 (Supp. III 1997) (statutory notes).

1997). Along with the Seventh Circuit, the Tenth Circuit has concluded that restitution is not criminal punishment subject to the constraints of the *Ex Post Facto* Clause. *United States* v. *Nichols*, 169 F.3d 1255, 1279-1280 (10th Cir.), petition for cert. pending on other issues, No. 99-5063 (filed June 30, 1999).

This case, however, does not squarely present the question whether the MVRA, consistent with the *Ex Post Facto* Clause, may be applied to criminal offenses occurring before the Act's effective date, because petitioner was not disadvantaged by the application of the MVRA. The district court explicitly found that petitioner "has the ability to make restitution" in the amount awarded by the court. Pet. App. 18a.

Indeed, consistent with the VWPA, 18 U.S.C. 3664(a) (1988), the district court considered "the amount of loss sustained by the victims," "the financial resources of the defendant," "the financial needs of the defendant and his or her dependents," and "the financial earning ability of the defendant and his or her dependents." Pet. App. 18a (quoting *United States* v. *Boyle*, 10 F.3d 485, 490 (7th Cir. 1993)). The district court found that those "factors weigh in favoring of ordering restitution." *Id.* at 19a. As the district court explained:

> The victims lost large amounts of money as a result of [petitioner's] scheme, some of which had been saved for retirement funds. [Petitioner] has the capacity, especially given his current and past entrepreneurial enterprises, to make restitution. [Petitioner] has little debt and is currently engaged in an apparently lucrative business venture. Finally, [petitioner] has only one dependent, his wife, and her salary is greater than his. Thus, an order of restitution is appropriate.

Ibid. Petitioner thus received the benefit of the more favorable standards for imposing restitution under the VWPA.

Citing this Court's decision in *Lindsey* v. *Washington*, 301 U.S. 397 (1937), petitioner suggests (Pet. 17 n.7) that "whether Petitioner would receive a different restitution sentence" under the VWPA is irrelevant to whether this Court should consider his *ex post facto* challenge. Petitioner's reliance on *Lindsey* is misplaced.

In *Lindsey*, 301 U.S. at 401-402, the Court held that a State could not retroactively apply a statute that provided for a court to impose a mandatory 15-year maximum term of imprisonment (subject to the later possibility of parole), when prior law permitted a judge to impose a maximum term of 15 years or less. The Court reasoned that the law disadvantaged the defendant because he was deprived of the opportunity to avoid a mandatory maximum sentence of 15 years. *Id.* at 400-401. The Court also stated that, although "petitioners might have been sentenced to fifteen years under the old statute, * * * the *ex post facto* clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed." *Id.* at 401.

Unlike the situation in *Lindsey*, it was not just theoretically possible that petitioner would be ordered to pay restitution. The standards of the prior law were in fact applied to petitioner; the district court expressly considered and rejected petitioner's contention that he lacked the financial ability to pay restitution. Pet. App. 18a. Petitioner therefore was not deprived of "the right to avoid a mandatory imposition of restitution and to have evidence of his ability to pay taken into con-

sideration by a sentencing court in deciding to impose an order of restitution as part of a sentence." Pet. 18.

Petitioner, moreover, waived the right to raise the issue in his plea agreement. In that agreement, petitioner stipulated that "restitution is appropriate in this case," and he "agreed to make restitution" in the amount determined by the court. App., *infra*, 5a. See also 18 U.S.C. 3663(a)(3) (1988 Supp. IV 1992) (authorizing court to "order restitution in any criminal case to the extent agreed to by the parties in a plea agreement."); *United States* v. *Andersen*, 928 F.2d 243, 245 (8th Cir. 1991) (district court could properly order restitution based on plea agreement despite defendant's financial inability to pay). This case accordingly is not a suitable vehicle for considering the general question whether the district court was required to consider petitioner's ability to pay the amount of restitution ordered by the district court.

2. Apart from the lack of significance to the restitution order in this case, the question whether the MVRA may be applied to criminal offenses committed before the date of its enactment is of diminishing significance in criminal cases generally. That question has relevance only to those offenders who committed their underlying offenses before April 24, 1996, when Section 3663A and the new Section 3664 became effective. The number of offenders potentially affected by the question presented here is therefore limited, and the number of cases in which the MVRA might make a difference to the outcome fewer still. Accordingly, this Court's review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JAMES K. ROBINSON
Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

SEPTEMBER 1999

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

CRIMINAL NO. 96-30025

UNITED STATES OF AMERICA, PLAINTIFF

v.

LARRY D. BACH, DEFENDANT

[Filed: Nov. 3, 1997]

PLEA AGREEMENT

Pursuant to Rule 11, subsections (a)(2) and (e)(1)(A) and (B) of the Federal Rules of Criminal Procedure, the United States of America, by its attorneys, Frances C. Hulin, United States Attorney for the Central District of Illinois, and Assistant United States Attorney Esteban F. Sanchez, and the defendant, Larry D. Bach, personally and by his attorneys, Howard W. Feldman and Stanley N. Wasser, have agreed upon the following:

Charges and Potential Statutory Maximum Penalties

1. The defendant, Larry D. Bach, will voluntarily plead guilty to Count 1 of the indictment which charges the offense of Mail Fraud in violation of 18 U.S.C. §1341. Said plea of guilty is hereby explicitly conditioned on the defendant's reservation of his right to appeal from the judgement of this court, this court's ruling of May 6, 1997 denying defendant's pretrial Motion to Dismiss Indictment which alleged that the

indictment in this cause did not alleged an offense committed within the statute of limitations and in the alternative alleging prosecutorial delay in bringing the indictment. Rule 11 (a)(2). F.R.Cr. P.

2. The maximum potential statutory penalties for said offense pursuant to 18 U.S.C. §1341 are as follows:

- a maximum term of imprisonment of 5 years;
- a fine of up to $250,000.00 or both;
- a period of supervised release of 3 years; and
- a $50 mandatory special assessment.

Element of Offense

3. To sustain the charge of Mail Fraud, the government must prove the following propositions beyond a reasonable doubt:

- First, that the defendant knowingly devised the scheme to defraud as described in the indictment;
- Second, that for the purpose of carrying out the scheme or attempting to do so, the defendant used the United States mail or caused the United States mails to be used in the manner charged ~~in the manner charged~~ in Count 1 of the indictment; and
- Third, that the defendant did so knowingly and with the intent to defraud.

Terms and Conditions

4. ***Government's Calculation of Amount of Loss***: The government believes that the amount of loss associated with the scheme to defraud described in the indictment is between $800,000.00 and $1,500,000.00. At the time of sentencing the parties reserve the right to present evidence in support of or in opposition to the

amount of loss determined by the probation office, including evidence as to (a) whether an investor was a person defrauded by the scheme and (b) the actual dollar amount of an investor's loss, if any.

5. ***Parties Agreement Regarding Applicable Enhancements***: The parties agree that the following enhancements are applicable to the defendant in calculating his offense level pursuant to the United States Sentencing Guidelines:

a) *Minimal Planning*: Pursuant to USSG §2F1.1 the parties agree that the offense involved more than minimal planning and the offense base offense level should be increased by 2 levels.

b) *Victim Related Adjustment*: The parties agree that the victims related adjustments of USSG § 3A1.1 (Hate Crime Motivation or Vulnerable Victim) are not applicable as there is no evidence to support the proposition that the defendant committed the crime in question motivated by race or that the victims were vulnerable as defined by that section.

c) *Aggravating Role In The Offense*: Pursuant to USSG § 3B1.1(c) the parties agree that the defendant offense level should be increased by 2 levels because he was an organizer, leader, manager or supervisor in the criminal scheme described in the indictment.

d) *Abuse of Position Of Trust Or Use Of Special Skill*: The parties agree that the enhancements USSG §3B1.3 are not applicable because the defendant used skills (knowledge of the oil and gas industry) in the special commission of this offense. Since the parties have agreed to an aggravating role enhancement pur-

suant to USSG § 3B1.1(c), this enhancement is inapplicalbe as stated in USSG §3B1.3.

6. ***Sentencing Recommendations***: The government agrees that at the time of sentencing it will recommend a sentence between the middle to low end of the applicable sentencing guideline range. The defendant agrees and understands that at the time of sentencing both the defendant and the government (subject to the limitation stated above) will be free to recommend whatever sentence they deem appropriate. The court will not be bound by said recommendations.

The government further agrees not to oppose a request by the defendant to the Court for a recommendation by the Court to the Bureau of Prison that the defendant be imprisoned in a facility which is as close to his home is practicable. The defendant understand that neither the United States Attorney's Office nor the Court may direct the Bureau of Prisons to house the defendant in a particular correctional facility and that the ultimate decision in this regard rest exclusively with the Bureau of Prisons.

7. ***Dismissal of Remaining Count***: At the time of sentencing the government agrees to dismiss the remaining count of the indictment, Count 2.

8. ***Acceptance of Responsibility***: The government agrees, based upon the facts currently known by the government, that the defendant has clearly demonstrated a recognition and affirmative acceptance of personal responsibility for his criminal conduct in accordance with §3E1.1 of the United States Sentencing Guidelines and, therefore, a two-level reduction in the offense level is appropriate. This agreement does not

preclude the government from changing its position if new evidence to the contrary is discovered or if the defendant later demonstrates a lack of acceptance of personal responsibility.

9. ***Early Notification of Intent to Plead Guilty***: The government also agrees that the defendant qualifies for an additional one-level reduction in his offense level pursuant to §3E1.1(b)(2) of the Sentencing Guidelines because he timely notified the United States Attorney's Office of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently.

10. ***Restitution***: The parties stipulate that restitution is appropriate in this case. The defendant acknowledges that the court will make an independent determination of the amount of restitution. The defendant agrees to make restitution and pay any fine imposed by the Court in the time and manner to be determined by the United States Probation Office and the United States Attorney's Office for the Central District of Illinois.

11. ***Mandatory Special Assessment***: The defendant agrees to pay the mandatory special assessment in the amount of $50.00 at the time of sentencing by delivering cash, money order or cashier's check made payable to the United States District Court or to the Clerk of the United States District Court or as otherwise directed by the Court, and he further understands that he will be required to do so as a condition of this plea agreement. Failure to comply with this requirement, however, will not constitute grounds for the defendant to withdraw his plea of guilty.

12. ***Cost of Imprisonment and Supervision***: The defendant understands that the court may also order the defendant to pay the cost of imprisonment and supervision.

STIPULATION OF FACTS
(FACTUAL BASIS)

13. The defendant will plead guilty because he is in fact guilty. In pleading guilty, the defendant stipulates and agrees to the following:

From approximately July, 1988, or before, and continuing through December, 1992, in the Central District of Illinois and elsewhere, the defendant knowingly devised and executed a scheme to defraud others and obtain their money by means of false and fraudulent pretenses, representations and promises. As part of such scheme the defendant approached individuals in the Central District of Illinois and elsewhere and encourage them to invest money in various oil and gas well programs the defendant had an interest. In order to induce such individuals to invest money in his oil and gas wells programs, the defendant made the following false and misleading pretenses, representations and promises to such individuals knowing that pretenses, representations and promises were false and fraudulent when made:

a. The defendant represented to investors that they would receive monthly payout for 22 months of $869 or $934 (depending on the program) for every $25,000.00 invested in his programs, and that upon the completion of the 22 month payout period, investors would share on a pro rata basis based on their amount of investment the oil or gas revenue generated by the projects. The defendant told investors that the revenues generated

from the oil reserves in these programs would be sufficient to guarantee long term monthly payout far in excess of their investment.

b. The defendant failed to in form the investors that he could not guarantee that sufficient oil and gas revenues would be generated to pay investors the guarantee monthly payment or any subsequent payment beyond the 22 guaranteed monthly payments.

c. Bach represented his company Bach Energy Corporation (BEC) and his programs to be in good financial condition when in fact BEC was in substantial arrears regarding the payment of guaranteed monthly payout to investors in other BEC oil and gas projects.

d. Bach represented to investors that the BEC programs were approved for a tax credit by the Internal Revenue Service and that investors would receive substantial tax benefits from their investment. In fact, the BEC programs were never approved by the Internal Revenue Service for a tax credit.

e. Bach falsely misrepresented to investors his education and experience in the oil and gas industry.

f. On or about June 25, 1991 in the Central District of Illinois, the defendant for purposes of executing and attempting to execute the scheme described above did knowingly cause to be delivered by the United States Postal Service, according to directions thereon, an envelope containing a check in the amount of $934 falsely represented as revenue from the oil from the BEC 88-6 program, addressed to Gary Hepburn, 927 Rickard Court, Springfield, Illinois 62704.

As a result of said scheme Bach diverted investor funds and production revenues to his own use or to pay the guaranteed monthly payments to other investors contrary to his representations to the investors.

ACKNOWLEDGMENTS AND WAIVERS OF RIGHTS

14. ***Acknowledgment of Understanding of Charge***: The defendant hereby acknowledges that he has read the charge against him. The charge has been fully explained to him by his attorneys and he fully understands the nature of the charge against him and the potential penalties described above.

15. ***Application of United States Sentencing Guidelines***: The defendant understands and agrees that the United States Sentencing Guidelines apply to the defendant's offense and that the applicable provision of the Guidelines in Section 2F1.1.

16. ***Acknowledgment of Understanding of Guidelines Application***: The defendant further acknowledges that he has reviewed the applicable Sentencing Guidelines with his attorneys, including but not limited to Section 1B1.3 (Relevant Conduct), 2F1.1 (Offenses Involving Fraud and Deceit) and 4A1.1 (Criminal History Calculation). The defendant acknowledges that the application of the United States Sentencing Guidelines have been fully explained to him by his attorneys and he understands said.

17. ***Presentence Investigation and Report***: The defendant acknowledges and understands that prior to sentencing the court will order the United States Probation Office to conduct a presentence investigation and prepare a report, pursuant to Rule 32 of the Federal

Rules of Criminal Procedure. The defendant further acknowledges and understands that the court will resolve, prior to sentencing, any factual or legal disputes the parties may have with the presentence report. The court will use the information contained in the presentence report and any evidence the parties may present in sentencing the defendant.

18. ***Independent Findings by the Court***: The defendant understands and agrees that at the time of sentencing the court may receive evidence presented by the parties and make legal and factual findings regarding the offense level, including but not limited to the amount of loss associated with he scheme to defraud for which the defendant will be held accountable for at sentencing, role in the offense adjustments, acceptance of responsibility adjustments and criminal history of the defendant. The court will calculate and determine the applicable sentencing guideline range based on those findings. The defendant specifically agrees that the court will be free to make its own independent findings as to the amount of loss associated with the scheme to defraud for which the defendant will be held liable at sentencing. An objection to the court's rulings pertaining to the application of the sentencing guidelines will not give the defendant any right to withdraw his plea of guilty.

19. ***Exclusive and Independent Sentencing Authority of Court***: The defendant further agrees that at the time of sentencing the court will not be bound by any recommendation made by any party, and that the court will be free to impose whatever sentence it deems appropriate subject to the limitations of the United States Sentencing Guidelines. The defendant under-

stands and agrees that he will not be allowed to withdraw his guilty plea because of an objection to the calculation of the sentencing guidelines or to the court's sentencing findings or rulings.

20. ***Trial***: Defendant understands that by pleading gl that those rights and the consequences of his waiver have been explained to him by his attorneys:

(a) The right to plead not guilty or persist in the plea of not guilty if already made. If the defendant persisted in a plea of not guilty to the charge against him, he would have the right to a public speedy trial.

(b) The right to a trial by jury. The trial could be either a jury or a trial by the judge sitting without a jury. The defendant has an absolute right by jury. If the trial is a jury trial, the jury would be composed of twelve persons selected at random. The jury would have to agree unanimously before it could return a verdict of either guilty or not guilty. The jury would be instructed that the defendant is presumed innocent, and that it could not convict him unless, after hearing all the evidence, it was persuaded that the government had met its burden of proving the defendant's guilt beyond a reasonable doubt.

(c) The right to the assistance of counsel. The defendant has the right to be represented by an attorney at every stage of the proceedings and, if the court finds the defendant is unable to afford an attorney, one will be appointed to represent the defendant at no cost to the defendant.

(d) The right to confront and cross-examine adverse witnesses. At a trial, the government would be required to present its witnesses and other evidence against the defendant. The defendant would be able to see and hear those government witnesses and his attorney would be able to cross-examine them. In turn, defendant's counsels could present witnesses and other evidence in defendant's behalf. If the witnesses for defendant would not appear voluntarily, their attendance could be required through the subpoena power of the court.

(e) The right against compelled self-incrimination. At a trial, defendant would have a privilege against self-incrimination so that he could decline to testify, and no inference of guilty could be drawn from his refusal to testify. If defendant desires to do so, he could testify in his own behalf.

AGREED:

Defendant:

21. I have read this entire plea agreement carefully and have discussed it fully with my attorneys. I fully understand this agreement, and I agree to it voluntarily and of my own free will. I am pleading guilty because I am in fact guilty, and I agree that the facts stated in this agreement about my criminal conduct are true. No threats, promises, or commitments have been made to me or to anyone else, and no agreements have been reached, express or implied, to influence me to plead guilty other than those stated in this written plea agreement. I am satisfied with the legal services provided by my attorneys. I understand that by signing below I am stating I agree with everything stated in

this paragraph, and I am accepting and entering into this plea agreement.

Date: 11/3/1997 /s/ LARRY D. BACH
LARRY D. BACH
Defendant

Defendant's Attorney:

22. We have discussed this plea agreement fully with our client, and we are satisfied that our client fully understands its contents and terms. No threats, promises, or representations have been made, nor agreements reached, express or implied, to induce our client to plead guilty other than those stated in this written plea agreement. We have reviewed with our clients Sections 1B1.3 and 1B1.4 of the Sentencing Guidelines.

Date: November 3, 1997
/s/ HOWARD W. FELDMAN
HOWARD W. FELDMAN
Defendant's Attorney

Date: November 3, 1997
/s/ STANLEY N. WASSER
STANLEY N. WASSER
Defendant's Attorney

United States

23. On behalf of the United States of America, I accept and agree to this plea agreement.

Date: November 3, 1997

/s/ ESTEBAN F. SANCHEZ
ESTEBAN F. SANCHEZ
Assistant United States
Attorney

Supreme Court, U.S.
FILED
OCT 7 1999
OFFICE OF THE CLERK

(3)

No. 99-127

IN THE

Supreme Court of the United States

LARRY D. BACH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY ARGUMENT

A. This Case Does Squarely Present The Issue Upon Which Petitioner Seeks Review.

The Brief of the United States in Opposition to Defendant's Petition For A Writ of Certiorari argues in its essence that this case does not squarely present the question of whether the *Ex Post Facto* Clause bars the application of the Mandatory Victims Restitution Act of 1996 ("MVRA"), 18 U.S.C. §§ 3663A and 3664 (Supp. III 1997), because Petitioner was found to have the ability to make restitution and thus was not disadvantaged by the application of the MVRA. (Opp. Brief at p. 6). To the contrary, Petitioner was clearly disadvantaged. Petitioner has been saddled with a most onerous mandatory restitution obligation by reason of the Seventh Circuit's affirmance of the District Court's application of the MVRA to Petitioners' case. The Seventh Circuit's affirmance of the District Court's judgment sentencing Petitioner did not address Petitioner's challenge to the District Court's alternative finding and conclusion that Petitioner had the ability to immediately pay restitution of $674,325.84. Thus, Petitioner has clearly been disadvantaged because he has been sentenced to pay a substantial restitution sum immediately without regard to his ability to pay that sum. Most certainly this makes Petitioner's punishment for the crime more burdensome, and thus clearly triggers *ex post facto* concerns. *Dobbert v. Florida*, 432 U.S. 282, 292 (1977).

The United States attempts to distinguish Petitioner's reliance on *Lindsey v. Washington*, 301 U.S. 397 (1937), contending that it was not simply a theoretical possibility that Petitioner would be ordered to pay restitution as the District Court rejected Petitioner's contention that he had

no ability to pay restitution. (Opp. Brief at p. 7). Petitioner does not disagree that he was likely to be subject to a restitution order but not one of the onerous magnitude with which he has been shouldered by reason of the application of the MVRA. The record in this case raises a distinct and realistic possibility that the District Court's finding of Petitioner's ability to pay would not justify upholding under the Victim and Witness Protection Acto of 1982 ("VWPA"), 18 U.S.C. § 3663(a), the onerous restitution imposed upon him, over $600,000 payable immediately.

The sole finding of the District Court as to Petitioner's ability to pay restitution under VWPA is the excerpt quoted at page 6 of the Brief of the United States in Opposition, namely that Petitioner "had the capacity, given his current and past entrepreneurial enterprises, to make restitution." This finding stood in sharp contrast to the District Court's approbation of Petitioner at sentencing that the Defendant had no demonstrated history of making an honest buck[1]. The July 1998 revised Presentence Report ("PSR") record before the District Court indicated that Petitioner would be 60 years old when released; that his educational experience was high school and a few college semesters; that his past entrepreneurial ventures resulted in a bankrupt real estate business and his being banned from securities sales; that he will come out of prison saddled with a mail fraud conviction that imposes a significant impediment to his gaining any meaningful employment with others; that he filed bankruptcy, along with his wife, in 1988 and 1997; that at the time of sentencing he had a net worth of some $22,000, a net monthly income together with his spouse of $544, and

1. Reprinted in the Appendix to this Reply Brief at 1a is the excerpt from the transcript of Petitioner's sentencing hearing reflecting this view of the District Court.

that his wife's business where he was employed had a negative total equity of some $158,000 and a negative net income of some $81,000. Moreover, the PSR reported that Petitioner, his wife, and his now defunct energy company had previously disgorged $452,318.42 in the 1992 SEC action against them to pay claims.

The imposed restitution obligation of over $600,000, due immediately from Petitioner, who began serving a 30 month imprisonment sentence on October 14, 1998, is, on its face, impossible for Petitioner to meet, and as such presents a very serious question of whether it could ever be a valid restitution order that would be affirmed by the Seventh Circuit Court of Appeals. *See e.g.*, *United States v. Lampien*, 89 F.3d 1316, 1323 (7th Cir. 1996)[2], collecting cases from the Second, Third, Fourth, Ninth and Eleventh Circuits, as well as other Seventh Circuit cases, and observing that appellate courts have not hesitated to vacate restitution orders as sham orders where the record clearly indicates that the defendant is unable to satisfy the order because such orders defeat any hope of restitution, impede the rehabilitative process and threaten the respect for judicial orders generally.

Thus, this case squarely presents a compelling case to decide the question of whether the MVRA was unconstitutionally applied to Petitioner. If the MVRA cannot be constitutionally applied to Petitioners' case, then Petitioner's restitution obligation must consider his ability to pay. The record in this case raises serious questions whether the District Court's "ability to pay" finding,

---

2. *Lampien* involved the rejection of a restitution order under VWPA of almost $500,000 imposed on a 60 year old defendant convicted of embezzlement who had only a pension and nominal social security income, limited work experience and poor health.

subjecting Petitioner to an immediately payable restitution order of over $600,000, can withstand scrutiny. Petitioner is thus clearly disadvantaged by the application of the MVRA to his case as Petitioner has been deprived of the right of having his ability to pay rightfully considered in determining the amount of restitution he should pay.

B. Petitioner Did Not Waive His Right To Raise The Issue.

The Brief of the United States in Opposition to Defendant's Petition For A Writ of Certiorari argues that Petitioner, by stipulating in his plea agreement that "restitution is appropriate", waived the right to raise before this Court the constitutionality of the retroactive application of the MVRA to his case. (Opp. Br. at p. 8). This argument is based upon a mischaracterization of the record in this case. Petitioner did agree in his plea agreement that restitution is appropriate, as it always is in fraud loss cases. Petitioner did not, however, agree on the extent of restitution nor that he had any ability to pay any significant restitution sum. Nor did Petitioner stipulate in his plea agreement that the MVRA applied to his case. Petitioner's PSR never said that the Mandatory Victim Restitution Act applied, but rather applied the VWPA to Petitioner's case. Only after the United States belatedly raised issue of the MVRA did the federal Probation Office issue an addendum three days prior to the sentencing hearing saying that the MVRA applied[3]. Petitioner immediately filed an objection to the application of the MVRA. Further, in the underlying appeal, the United States never argued that Petitioner waived this issue, nor did the opinion of the Seventh Circuit Court of Appeals find waiver

3. Reprinted in the Appendix to this Reply Brief at 4a is that addendum.

by Petitioner in its affirmance of the District Court's application of the MVRA to Petitioner's case.

C. Whether The Ex Post Facto Clause Bars The Retroactive Application of the MVRA Is Not An Insignificant Question.

The Brief of the United States in Opposition to Defendant's Petition for a Writ of Certiorari argues that the constitutionality of applying MVRA retroactively is of diminishing significance in criminal cases generally in that it is only relevant to offenders committing offenses before April 24, 1996, thereby limiting the number of offenders potentially affected by the question and ultimately the number of case in which the MVRA might made a difference. (Opp. Br. at p. 8). To the contrary, review is warranted. The strength of our constitutional protections should not depend upon the number of persons who might be affected by their application. Moreover, it is clear from the number of cases that have addressed this issue through all of the Circuit Courts of Appeal, numerous offenders have been affected by this question. Regrettably, only offenders, like Petitioner, who ended up being prosecuted in the jurisdictions of the Tenth and Seventh Circuits, have been subjected to the retroactive application of the MVRA. The argument of the United States is that just because a few offenders have had their constitutional rights violated, they should not have their constitutional rights vindicated. Interestingly, Petitioner's offense conduct took place in Louisiana, the geographic jurisdiction of the Fifth Circuit. Had Petitioner been prosecuted in that jurisdiction, or in any other jurisdiction outside the Tenth and Seventh Circuit where the investors resided, Petitioner would not have been subjected to a mandatory restitution sentence.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — EXCERPTS OF SENTENCING HEARING IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS, SPRINGFIELD DIVISION DATED SEPTEMBER 14, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

NO. 96-30025

SENTENCING

SPRINGFIELD, ILLINOIS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LARRY D. BACH,

Defendant.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RICHARD MILLS
U.S. DISTRICT JUDGE

SEPTEMBER 14, 1998

* * *

Appendix A

[commencing at page 68]

And so I find that they are credible. And so here you are.

Now, I came within a hair of not giving you credit for acceptance of responsibility or the timeliness. But when push comes to shove and we get right down to the final nitty-gritty, you did plead guilty. You accepted the responsibility for having committed this offense of mail fraud, and you did so in a timely manner.

Now, you've taken advantage of your other right and that is to object; although in my estimation with almost nothing to object about; to these figures. I'm calling that in your favor. So here you are, 27 to 33 months, and you're going to do time, no question about it.

Now, quite frankly, Mr. Feldman, I was going to do 32 months; so that shows you were wrong in this particular instance. But I am going to follow the recommendation of the Government after all. And I just wanted you to know that. That's in the middle. Dead center in the middle of the guidelines, Mr. Bach.

Very good argument can be made that even though I denied the Government's objection to the acceptance of responsibility, I think that the amount of damage that you have done and the background that you have done and this scheme and you have lived all of your adult life by reading in this PSR there going back. And you've been trying to find the free lunch all along and live well off of somebody else.

[69] You know, and it's interesting to read some of these interviews. And you get in there and you see that you live well, but then you lived hand to mouth. Dr. Russell and his wife came down there, remember, and they see this beautiful home you live in, but there's very little furniture there. Very little furniture. When it came time to go out to lunch, your wife had to borrow money from her father to take them out. Now, isn't that something.

So here is a common thread throughout your entire productive life. And you're 57 years of age. And you're trying to pull the wool over everybody's eyes, and a quick buck and something for nothing. Ultimately, it all comes to naught. And it's a tragedy to say that for you it has come to today.

Restitution is going to be imposed. And pursuant to the Anti-terrorism and Effective Dealt Penalty Act of 1996, particularly 18 U.S.C. 3663(A) of the Mandatory Victim Restitution Act of 1996, restitution in the amount of $674,325.84 is mandatory. This restitution is owed to the victims in the instant offense and is due immediately.

Pursuant to the Sentencing Reform Act of 1984 and the U.S. Sentencing Commission Guidelines Manual as amended November 1 of 1997, it is the judgment of this Court that the Defendant, Larry D. Bach, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 30 . . .

* * *

APPENDIX B — FEDERAL PROBATION OFFICE ADDENDUM

SUPPLEMENTAL/ADDITIONAL INFORMATION

The following information was received by the U.S. Probation Office after the Presentence Report was disclosed.

68. **Statutory Provisions:** Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, particularly 18 U.S.C. § 3663A of the Mandatory Victim's Restitution Act of 1996, restitution in the amount of $676,088.22 is mandatory.

69. **Guideline Provisions:** In accordance with the provisions of U.S.S.G. § 5E1.1, in cases where there is an identifiable victim, restitution shall be ordered.

Also, on September 4, 1998, a Victim Impact Statement was received from Edward J. Meyers. According to Mr. Meyers, "I took out a home equity loan to invest in 1/4 unit of BEC 88-1 Tipco lease through Bach Energy Corp. Based on the guarantees made by Larry Bach, I estimated I would be able to repay the loan in 2-3 years and have a steady source of income for 30+ years. After a very short time, the guaranteed payments of $869.00 stopped coming and I was forced to make payments out of pocket or potentially lose my house. This put a very big financial burden on me and my wife, and resulted in a great deal of tension in our marriage. Eventually, Mr. Bach made the 22 payments, only after constant letters and phone calls from me, and countless sleepless nights. I never got the complete repayment of the initial investment I was promised, and I am still paying on the home equity loan (interest built up quickly during the periods I was not

receiving BEC payments and being forced to make minimal or partial payments on the loan)"

Subsequent to the Revised Presentence Report being disclosed, the Government mailed letters to all victims asking if they had received any compensation from Quest Energy, Inc. Or Southern Oil and Gas. Based on the responses received, the following victims have had their restitution amounts reduced:

Robert Burrows
$10,605.08 – 10,144.90 (Quest) = $ 460.18

James Connett
$19,402.76 – 980.14 (Quest = $18,422.62

Victor Hallman
$19,402.76 – 658.44 (Quest) = $18,744.32

Gary Hepburn
$5,307.51 – 346.26 (Quest) = $4,961.25

John Keane (Estate)
$8,524.95 – 11,310.86 (Quest) = $0.00

Herbert Miller
$19,402.76 – 612.64 (Quest) –
6,691.32 (SO&G = $12,098.80

Don Pohlmann (Estate) $136,874.41 – 2,477 (Quest) –
3,044.00 (SO&G) = $131,353.41

Appendix B

Gerald Sheppard
$41,731.53 – 165.00 (Quest) = $41,566.53

Therefore, the total amount of restitution is reduced to $676,088.22.

The above information was received after the Presentence Report was disclosed. If you have any objections to information in the disclosed report and have not yet submitted these objections in writing to the U.S. Probation Office, you should include any objections to this supplemental information in said written communication, pursuant to paragraph 3 of the Court's *ORDER ON IMPLEMENTATION OF SENTENCING GUIDELINES*. If you have already communicated your written objections to the U.S. Probation Office prior to receiving this supplemental/additional information, you still have two opportunities to raise objections, pursuant to paragraph 6 of the *ORDER ON IMPLEMENTATION OF SENTENCING GUIDELINES*:

1. At least seven working days prior to the date set for sentencing, counsel shall file a pleading with the Court entitled "Position of the (Party) with Respect to Sentencing Factor" and,

2. At the Sentencing Hearing, the Court, for good cause shown, may allow a new objection or response to be raised any time before the imposition of sentence.

18 U.S.C. § 3552(d) states: "The court shall assure that a report filed pursuant to this section is disclosed to the defendant, the counsel for the defendant, and the attorney

for the Government at least ten days prior to the date set for sentencing, unless this minimum period is waived by the defendant."

Therefore, if this additional information is disclosed to defense counsel within ten days of the sentencing date, the defendant must either waive the ten-day period or the sentencing date must be postponed. It is the defendant's responsibility to execute the waiver or seek a postponement.

( ) I hereby waive the ten-day disclosure period.

( ) I hereby decline to waive the ten-day disclosure period and request a postponement of the sentencing hearing.

_____
Defendant

_____
Defense Counsel